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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1267

THEATRES SERVICE COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION
and DANCE FREIGHT LINES, INC.

On Appeal from the United States District Court for the Northern District of Georgia

JURISDICTIONAL STATEMENT

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March 29, 1968

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia from which this appeal is taken is not reported, but is printed in the Appendix hereto at pages 1a to 7a. The decision and

order of the Interstate Commerce Commission and the report and recommended order of the I.C.C. hearing examiner which were the subject of the District Court proceedings are not reported, but are printed in the Appendix at pages 8a to 28a.

JURISDICTION

This is a civil action to enjoin and set aside an order of the Interstate Commerce Commission. The action was brought pursuant to 5 U.S.C. § 706, 28 U.S.C. §§ 1336, 1398, 2284, and 2321-25, and 49 U.S.C. §§ 17(9), 305(g) and (h), 306(a), 307(a), and 312(a). The decision of the court below was entered on November 27, 1967. The notice of appeal was filed by appellant on January 26, 1968, in the United States District Court for the Northern District of Georgia.

The jurisdiction of this Court is conferred by 28 U.S.C. § 1253, as this is an appeal from an order denying a permanent injunction in a civil action required by the above-cited Acts of Congress to be heard and determined by a three-judge district court.

QUESTIONS PRESENTED

Upon the formal complaint of Dance Freight Lines, Inc., the Interstate Commerce Commission instituted a proceeding to determine whether appellant had performed certain transportation operations as a motor common carrier in interstate commerce without appropriate authority. After a hearing, the I.C.C. concluded that the operations had been unlawful, and ordered that appellant cease and desist from conducting similar operations in the future. The District Court affirmed.

The disposition by the I.C.C. and the District Court arbitrarily deprives appellant of its property (*i.e.*,

valuable operating rights) without reference to the controlling statutory and decisional standards and without due process of law. More specifically, the following questions are presented on this appeal:

I. In view of the fundamental rule of interpretation, recognized consistently by the I.C.C. and the courts (including this Court), that nontechnical language contained in outstanding I.C.C. certificates will be accorded its ordinary, accepted dictionary meaning and usage, does the action of the I.C.C. and the court below, in holding that the unambiguous terms in appellant's certificate should *not* be accorded their ordinary meanings and usage, constitute arbitrary and unreasonable action, and a deprivation of appellant's property without due process of law?

II. In view of the basic rule in an I.C.C. complaint proceeding that the burden of proof rests upon the complaining party to establish the allegations in its complaint, does the action of the Commission and the court below, in sustaining the complaint by *shifting* the burden onto appellant to affirmatively disprove the charges against it, constitute arbitrary and unreasonable action, and a deprivation of appellant's property without due process of law?

III. Did the District Court adequately discharge its duties and functions on review of the I.C.C. cease and desist order before it?

STATEMENT OF THE CASE

Commission Proceedings

This proceeding arose from a formal complaint filed with the Interstate Commerce Commission on September 2, 1965, by Dance Freight Lines, Inc. ("Dance"), the intervening defendant in the court below. Dance's complaint alleged that appellant had conducted operations which were beyond the scope of its outstanding I.C.C. certificate, and requested that a cease and desist order be issued. That certificate, No. MC-65697 (Sub-No. 2), insofar as is here pertinent, authorizes appellant to transport:

> *Magazines, books,* and *periodicals* consigned to or from magazine dealers and distributors,
>
> Between Atlanta, Ga., and points in Alabama, Tennessee, and Georgia [between designated points over specified routes].

More particularly, Dance's complaint alleged that appellant had transported 11 shipments of books from a certain consignor to several specified consignees, neither of which were within the required class of "magazine dealers and distributors", as described in the certificate. In support of its complaint, Dance produced at the hearing neither a representative of the consignor nor of any of the consignees. Instead, it relied upon a restrictive, "commercial" definition of the terms "dealer" and "distributor" in appellant's certificate.

Appellant answered the complaint, admitting that it had transported the 11 shipments, but contending that this transportation was within the scope of its authority, *i.e.*, that the shipments of books in every case moved either to or from a magazine "dealer" or "dis-

tributor". Appellant's position was based upon ordinary meanings and usage of the terms "dealer" and "distributor", as found in standard, accepted dictionaries,[1] as well as upon the lack of evidence to support the factual allegations in Dance's complaint, regardless of whether the involved terms are applied in accordance with ordinary or restrictive meanings.

Additionally, appellant filed with the I.C.C. an application seeking to modify the terms of its certificate by eliminating entirely the restrictive phrase "consigned to or from magazine dealers and distributors". Both Dance's complaint and appellant's application were consolidated by the Commission for hearing and decision.[2]

Commission Action

The report of the hearing examiner (pp. 10a-28a) was served on August 29, 1966. The report recommended that a cease and desist order be entered against appellant, as requested in Dance's complaint. This recommendation was based upon the examiner's conclusion "that all of the shipments which are the subject of the complaint were transported by defendant [appellant] without appropriate authority therefor". (p. 17a) In reaching this conclusion, the examiner refused to accord the terms "dealer" and "distributor" in appellant's certificate their ordinary meanings and usage, but, rather, substituted those terms with entirely different, more restrictive, terms on the basis

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[1] The ordinary meanings relied upon by appellant are discussed in note 8, *infra*.

[2] The I.C.C.'s decision with respect to appellant's application for modification was not a subject of the proceedings in the court below (see p. 1a).

that, in his personal "opinion", this would be appropriate (pp. 15a-17a). In light of those restrictive (substituted) terms, the examiner found that neither the consignor nor the consignees of the 11 shipments were shown to be "dealers" or "distributors" of magazines; and that, therefore, the negative allegation in Dance's complaint that such establishments are *not* magazine dealers or distributors had been proved (pp. 16a-17a).

The decision and order of the Commission, division 1 (pp. 8a-9a), was issued on March 20, 1967. By its decision, the Commission affirmed and adopted the examiner's findings and conclusions as its own. The I.C.C. ordered that appellant, effective May 29, 1967, cease and desist from conducting any motor carrier operations of the character found by the examiner to be unlawful. Subsequently, by order dated April 18, 1967, the I.C.C. postponed the effective date of its cease and desist order pending judicial review.

Lower Court Action

The opinion and judgment of the United States District Court (pp. 1a-7a) was entered on November 27, 1967. The court considered that it "must affirm" the cease and desist order if the I.C.C. "placed the proper interpretation upon the certificate" (p. 2a), thereby disregarding the nature of the I.C.C. complaint proceeding itself (*i.e.*, as involving "interpretation" of appellant's certificate only insofar as this is necessary to apply the terms therein to the factual allegations of Dance's complaint). In an opinion which defies rational analysis,[3] the court found that the I.C.C.'s action was "justified" and, accordingly, affirmed the cease and desist order *per curiam*.

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[3] The court's illogic, as well as its failure to fairly grasp the issues before it, is discussed in detail at pp. 36-43, *infra*.

THE QUESTIONS ARE SUBSTANTIAL

The problem here presented involves the power of the Interstate Commerce Commission to adjudicate, "interpret", and even alter the operating rights of a motor carrier upon the formal complaint of another carrier.

Is the I.C.C.'s power comprised of a boundless discretion, unrestrained by such notions as substantial evidence, rational basis, reasonable administrative action, and due process of law? The answer, according to precedent, clearly is in the negative; but the I.C.C. and the court below provided a contrary answer in this case.

The power to determine the scope of rights granted under outstanding I.C.C. certificates is a significant one. The fact that the process is initiated with a formal complaint or petition directed to *past* operations necessarily means that time, effort, and money have been expended in instituting and maintaining transportation services under the certificate. Manifestly, a determination after-the-fact of the meaning of operating rights previously granted should take into account the justifiable expectations of both the motor carrier and the shipping public which have relied upon the terms in the certificate, as granted.

In sustaining the complaint of Dance, the I.C.C. purported to "interpret" the critical, nontechnical terms in appellant's certificate and to apply those terms, as "interpreted", to the transportation performed by appellant on 11 shipments of books. In reality, the I.C.C.—under a mere guise of interpretation—*replaced* the original terms with *entirely different, more re-*

strictive, terms, without any stated basis other than the hearing examiner's personal "opinion" that this would be appropriate. In so doing, the I.C.C. completely frustrated the reliance which must be placed upon the ordinary meaning of nontechnical terms in a certificate.

Moreover, in holding that the 11 shipments were not authorized by appellant's certificate (as "interpreted"), the I.C.C. did not even require that Dance establish the factual allegations of its complaint. By this departure from established procedure and basic fairness, *the I.C.C. arbitrarily shifted onto appellant the burden of proving the falsity of the charges against it.*

It should be noted that the impact upon appellant of the action below extends far beyond the 11 shipments of books involved in the complaint. The I.C.C. ordered that appellant cease and desist from performing all operations "of a character" found by the hearing examiner to be unauthorized. Thus, the order applies to operations for consignors and consignees *other* than those considered in the complaint proceeding.

The arbitrariness of the decision poses a serious question whether appellant or any motor carrier safely may rely upon the language contained in their certificates, at least until this language has been formally challenged and litigated with respect to every aspect of the operations performed thereunder.

This appeal is to return to proper perspective the power of the I.C.C. to "interpret" operating authorities and to adjudicate the lawfulness of transportation

operations, so that appellant and other carriers will be assured rational administrative process and full protection against deprivation of their property without due process of law.

I. THE REFUSAL TO ACCORD THE TERMS IN APPELLANT'S CERTIFICATE THEIR ORDINARY MEANINGS WAS ARBITRARY AND A DENIAL OF DUE PROCESS

The I.C.C. did not simply "interpret" appellant's certificate. Instead, it *changed* that certificate by substituting the terms therein with different terms having different meanings. In so doing, the I.C.C. exceeded its powers; and, in sanctioning the Commission's action, the District Court failed to meet minimal standards for judicial review.

A. As Appellant's Certificate Is Unambiguous, It Must Be Interpreted on Its Face

All parties agree that the terms "dealer" and "distributor", as used in appellant's certificate, are not ambiguous.[4] Thus, in determining the meaning of those terms in the circumstances of this case, the certificate "must speak for itself."[5] That is, the question here presented must be resolved by interpretation of those terms, rather than by reference to the evidence presented in the original proceeding which led to the

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[4] The District Court erroneously stated that Dance contends "that the terms above referred to are ambiguous" (p. 3a). Not only Dance, but also the U.S. and I.C.C., expressly abandoned any such contention before the court (Tr. of oral argument in Dist. Ct., pp. 45-46, 79).

[5] *Contractors Cargo Co.—Ext. of Operations*, 96 M.C.C. 306, 310 (1964).

issuance of appellant's certificate.[6] This rule specifically has been applied in I.C.C. complaint proceedings, as here, to preclude resort to the record in the earlier proceeding.[7]

B. The Arbitrary Use of Restrictive "Commercial" Meanings Unlawfully Revoked a Material Portion of Appellant's Certificate

I. The Controlling Rule: Application of Restrictive "Commercial" Usage Must Have an Evidentiary Basis

Appellant has maintained before the examiner, the I.C.C., and the District Court, that the terms "dealer" and "distributor" in its certificate must be accorded their *ordinary meanings and usage,* as determined from standard accepted dictionaries,[8] in applying them to

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[6] *E.g., Parkhill Truck Co.* v. *United States,* 240 F. Supp. 842, 844 (N.D. Okla. 1965); *Scott Truck Line, Inc.* v. *United States,* 163 F. Supp. 118, 122 (D. Colo. 1958); *Ace Lines, Inc., Ext.—Cement Pipe,* 91 M.C.C. 559, 563 (1962); *Sims Motor Transport Lines, Inc., Revocation of Certificate,* 66 M.C.C. 553, 556 (1956), *aff'd sub nom., Sims Motor Transport Lines, Inc.* v. *United States,* 183 F. Supp. 113 (N.D. Ill. 1959), *aff'd per curiam,* 362 U.S. 637 (1960); *Jones Truck Lines, Inc.—Investigation & Revocation of Certificate,* 66 M.C.C. 503, 506 (1956); *P. Saldutti & Son, Inc., Interpretation of Permit,* 63 M.C.C. 593, 594 (1955).

[7] *E.g., Farm to Market Carriers, Inc.* v. *Elliott,* 67 M.C.C. 358, 359 (1956); *Asbury Park—N.Y. Transit Corp.* v. *Bingler Vacation Tours, Inc.,* 62 M.C.C. 731, 740 (1954); *P. B. Mutrie Motor Transportation, Inc.* v. *Blue Line Express, Inc.,* 53 M.C.C. 530, 533 (1951).

[8] By "ordinary" meanings appellant does not contend for *strained* meanings. Some of the horribles raised below by the U.S., I.C.C., and Dance plainly exceed the ordinary meaning of the involved terms, as used in appellant's certificate (*e.g.,* a "dealer" certainly is not a "card shark"). Examples of the *ordinary* meanings relied upon below by appellant are as follows: "Dealer" is defined as "one that divides, distributes, or delivers", *Webster's Third New International Dictionary* (unabr. 1966), or as "one who

the specific facts raised by the complaint. At all levels, this course has been rejected. Yet, examination of the reasons stated, within the context of governing principles, reveals that this action was entirely arbitrary.

The examiner held that, *in his opinion,* the involved terms should be interpreted restrictively, according to "commercial" or trade meanings and usage. On this purported basis, he proceeded to substitute for the term "dealer" in the certificate the much narrower term "retailer", and for the term "distributor" the much narrower term "wholesaler" (pp. 16a-17a).

In upholding the examiner's substitution, the District Court stated (pp. 5a-6a):

> [I]n transportation parlance through common usage certain terms and phrases take on a much more restrictive meaning, separate and distinct from an academic definition of the words utilized.

The court's statement is entirely correct—as a logical premise; but it does not, without evidence in this re-

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deals in merchandise, a trader; spec. one who sells articles in the same condition in which he bought them", *Oxford Universal Dictionary* (1964). "Distributor" is defined as "one that distributes"; and "distribute" as "to divide among several or many; . . . to give out or deliver esp. to the members of a group (distributing magazines to subscribers)", *Webster's, supra;* "distribution" is defined as "the marketing or mechandising of commodities (the mail—of books)," *Id.*, or as "the dispersal among consumers of commodities produced", *Oxford, supra.* The foregoing definitions clearly support the meaning ascribed to the term "distributor" by appellant's Assistant General Manager at the hearing as one "who distributes whatever the product might be. It could be through wholesalers, retailers, individuals, or what-have-you." (Tr. 36) ["Tr." refers to pages in the recorded transcript of proceedings before the examiner].

gard, support the examiner's conclusion that the particular terms involved *have* taken on restrictive meanings in transportation parlance.

The fundamental rule, as set forth in heretofore consistent holdings by the I.C.C. and the courts, is that restrictive transportation, commercial, or trade usage can be considered *only* when the terms in the certificate are shown either to be technical in nature or else to have acquired meanings which are different from their ordinary, accepted dictionary meanings and usage.

In reviewing an interpretation by the I.C.C. of the terms in a carrier's authority, this Court has stated:[9]

> [W]e first note that the plain meaning of words in a commodity description is controlling in the absence of ambiguity or specialized usage in the trade.
>
> * * * * *
>
> Moreover, appellant is unwilling to say that the instant description is a term of art, while the Commission specifically asserts that it is not. Consequently, *the ordinary meaning of the words used in the permit is determinative.*

Similarly, the I.C.C. has stated that, in interpreting a certificate, it will consider "whether the words employed have acquired a meaning in the trade or industry to which they pertain which is different from their ordinary or academic meanings."[10]

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[9] *Andrew G. Nelson, Inc.* v. *United States,* 355 U.S. 554, 557-58 (1958) [emphasis added]; see also, *Great Northern Ry.* v. *Merchants Elevator Co.,* 259 U.S. 285, 291-94 (1922); *Hancock Mfg. Co.* v. *United States,* 155 F. 2d 827, 831 (6th Cir. 1946).

[10] *Melton Truck Lines, Inc., Ext.—Materials Used in Installation of Roofing,* 88 M.C.C. 723, 733 (1962).

In order to apply other than ordinary meanings and usage to the terms in a certificate, the I.C.C. has made clear that this interpretative rule

> *contemplates the presentation of evidence* tending to establish or refute the existence of a general understanding in the transportation industry or of a trade practice or usage. . . .[11]

Thus, absent *affirmative evidence* that the terms have acquired restrictive or specialized meanings in the transportation industry or in the particular trade involved (*i.e.*, the printing or publishing trades), *the ordinary definition, as contained in standard, accepted dictionaries, governs interpretation of the terms.*[12]

This rule is an important one. It is based upon the legitimate expectations of layman shippers who, on a day-by-day basis, are the persons actually called upon to "interpret" and apply the terms in I.C.C. certificates in practical situations. Common sense dictates that the very use in a certificate of nontechnical

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[11] *Mushroom Transp. Co.* v. *Midwest Emery Freight System, Inc.*, 94 M.C.C. 51, 56 (1963) [emphasis added]; see also, cases discussed at pp. 18-22, *infra*.

[12] *E.g.*, *Aetna Freigh. Lines, Inc.—Inves. of Operations*, 100 M.C.C. 88, 93-94 (1965); *Contractors Cargo Co.—Ext. of Operations*, 96 M.C.C. 306, 312-13 (1964); *Melton Truck Lines, Inc., Ext.—Materials Used in Installation of Roofing*, 88 M.C.C. 723, 733 (1962); *Arco Auto Carriers, Inc., Ext.—Escanaba, Mich.*, 86 M.C.C. 555, 559-60 (1961); *Nelson Transport, Inc., Interpretation of Certificate*, 79 M.C.C. 740, 741-42 (1959); *Heuer Truck Lines, Inc.—Revocation of Certificate*, 62 M.C.C. 769, 772 (1954); *P. B. Mutrie Motor Transp., Inc. v. Blue Line Express, Inc.*, 53 M.C.C. 530, 533 (1951); *Carroll Trucking Co., Interpretation of Certificate*, 52 M.C.C. 178, 179 (1950). In the cited cases, the Commission utilized several standard, accepted dictionaries for this purpose, *e.g.*, *Webster's Third New International Dictionary; Merriam-Webster New Collegiate Dictionary;* and *Funk & Wagnalls New Standard Dictionary*.

descriptive terms, such as "dealer" and "distributor", negatives a restrictive or specialized trade, commercial, or transportation usage.[13] As will be seen, the action of the I.C.C. and the District Court violates not only common sense but also the above-stated rule of interpretation.

2. The Terms in the Certificate Must Be Accorded Their Ordinary Meanings and Usage

No I.C.C. decision is extant which bears upon the interpretation of the terms "dealer" and "distributor" in the context of the transportation industry. No publication has been found or cited which discloses a restrictive commercial definition of those terms in the printing or publishing trades. Further, not one whit of evidence in the record[14] indicates that those terms, as they are understood in transportation, printing, or publishing parlance, may be equated with the far more restrictive terms "wholesaler" and "retailer".

With respect to the term "distributor", the examiner seized upon a general "commercial" dictionary definition which pertains neither to the printing or publishing trades nor to the transportation industry (p. 15a).[15]

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[13] *Cf., T. I. McCormack Trucking Co.* v. *United States,* 251 F. Supp. 526, 535-36 (D.N.J. 1966); *T. I. McCormack Trucking Co., Inc.—Inves. & Revoc. of Certificates,* 102 M.C.C. 577, 580 (1966).

[14] By the "record" is meant the evidence adduced in the complaint proceeding. As to the efforts by Dance, the U.S., and the I.C.C. to utilize evidence of record in *another* proceeding to support the Commission's cease and desist order, see pp. 30-36, *infra.*

[15] *The Encyclopedic Dictionary of Business* (P-H 1952). The preface to this dictionary itself indicates the "broad fields of business activity" to which it relates. Ironically, the Examiner relied upon this dictionary immediately after stating: "Dictionary definitions are not helpful, as conceded by all parties." (p. 15a) Of course, no such concession ever was made by appellant.

Not only is the use of such a dictionary unprecedented,[16] but its use in this case is unjustified by any *evidentiary* showing that the restrictive definition actually utilized has become accepted and commonly applied in the transportation industry or in the printing or publishing trades. Moreover, that definition does not—by its terms—even relate to the word "distributor"; rather, it relates only to the narrower term "wholesaler".[17] At the very most, the definition indicates that, in a broad business context, one who is a "distributor" *may* be a "wholesaler", though *not necessarily* so. It certainly does not indicate, as the

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[16] No suggestion has been made by the examiner, Dance, the U.S., the I.C.C., or the District Court that *The Encyclopedic Dictionary of Business* (P-H 1952) is in common use in the transportation industry or regularly is applied by layman shippers in the printing or publishing trades.

[17] The entire entry for "distributor" in *The Encyclopedic Dictionary of Business*, p. 232 (P-H 1952), reads: "*Distributor.* See Wholesaler." On the apparent supposition that "See" indicates a synonymous word relationship, the examiner substituted the definition entered under "wholesaler" as an equivalent *per se* for the term "distributor". Such action is arbitrary on its face, as it is common knowledge that the introductory signal "See" in a dictionary definition is directory in nature, indicating merely a source for related information. See, *e.g.*, *Webster's Third New International Dictionary*, p. 20a, ¶ 16.1.1 (unabr. 1966). Counsel for the I.C.C. represented before the District Court that *Webster's New Collegiate Dictionary* utilizes "see" to indicate a synonymous definition (Tr. of oral argument, p. 68). However, that dictionary expressly uses "see" as merely "a *directional* cross-reference. It explicitly directs one to look somewhere else for further *information.*" *Id.* at ¶ 15.1 (1967; emphasis added). See also, preface to *The Encyclopedic Dictionary of Business* (P-H 1952) wherein it is stated: "If it is covered by a cross-reference the item to which you are referred gives the explanation. . . . Cross reference, to a capitalized word within a definition, is not necessary to an understanding of the term you are consulting, but you can refer to it if you wish."

examiner found, that in the present context one must qualify as a "wholesaler" in order to satisfy the generic description "distributor".[18] Further, the definition which the examiner arbitrarily applied to the certificate does not, on its face, purport to apply to all industries, trades or fields of general "commerce". *The very definition used by the examiner leaves open the evidentiary question* of the meaning of "distributor" in the printing or publishing trades or in the transportation industry.

With respect to the term "dealer", the examiner achieved the height of arbitrary action. In finding that "a magazine dealer . . . [is] one who deals in magazines at the *retail* level" (p. 16a; emphasis added), the examiner did not rely upon even a purported general "commercial" dictionary, as he did for the term "distributor". Rather, the examiner relied only upon his personal "opinion" (pp. 16a-17a). Further, the examiner extended his creativity by also applying to the term "dealer" some notion of a "primary business" doctrine, to wit (p. 17a):

> Only one or two publications described as being sold by the Atlanta store may possibly be clas-

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[18] In fact, such a notion is refuted by *The Encyclopedic Dictionary of Business* (P-H 1952) itself. The term "distribution" is defined in that dictionary as "the process of getting goods from the production line through Trade Channels or by direct selling (for example, Direct Mail) to the ultimate consumer, whether industrial or private. . . . Hence, distribution or marketing includes buying, selling, advertising, packaging, and transportation. It actually includes all functions that are not directly connected with production." The examiner's failure to consider this definition of the closely related term is contrary to precedent. *E.g., Heuer Truck Lines, Inc.—Revocation of Certificate*, 62 M.C.C. 769, 772 (1954); *Carroll Trucking Co. Interpretation of Certificate*, 52 M.C.C. 178, 179 (1950).

> sified as magazines. In the commercial sense, by which we must be guided here, the Book Stores are in no wise magazine dealers.

The court below was troubled by this vague improvisation[19]; however, for reasons unstated, it ruled "without hesitancy" that no error was committed (pp. 6a-7a).[20] The fallacy in this action is highlighted by the fact that, at the oral argument, counsel for the I.C.C. actually declined to defend the examiner's "primary business" doctrine,[21] which was adopted by the I.C.C. as part of its own decision (p. 9a).

By its machinations, the I.C.C. has substituted new terms for the express language in appellant's certificate. That certificate for 10 years plainly authorized the transportation of books "consigned to or from magazine *dealers* and *distributors.*" Suddenly, the authority has been limited to the transportation of books "consigned to or from *retailers primarily in magazines* and *magazine wholesalers*"—without any showing whatever that this limitation comports with

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[19] See Tr. of oral argument, pp. 93-105. *E.g.*, Hooper, J., referring to the language in the certificate, stated, *Id.* at 95: "Well, the Commission could say 'primarily' or 'substantially' or put something in there, but it just says 'magazine dealer.' *Looks like it would cover a dealer to any extent.*" (Emphasis added)

[20] The court so ruled despite testimony which it regarded as "revealing" wherein a representative from the book stores stated that the Atlanta store is a "dealer" in magazines, though it does not deal "primarily" in magazines (p. 6a). The court's lack of "hesitancy" regarding this detail in the examiner's "interpretation" is not very surprising, in light of the court's indifference toward the absence of evidence indicating restrictive meanings or usage.

[21] Tr. of oral argument, pp. 60-61.

the actual meaning or usage of the original terms, either in the transportation industry or in the trades involved.

This arbitrary substitution in the clear language of the certificate in fact constitutes a revocation of appellant's operating authority "under a guise of interpretative action" and, therefore, should be set aside.[22] There is no question but that the I.C.C. has not complied in this case with the requirements imposed by Congress in order to change or revoke the terms in the certificate.[23]

The three cases cited by the District Court in favor of upholding the Commission's "interpretation" actually support the opposite conclusion, to the extent that those cases are not inapposite. In the *Black* case,[24] upon which the U.S. and I.C.C. relied heavily below, the I.C.C. sought an injunction in federal court against a motor carrier on the ground that automobile parts, which the carrier was transporting, were not embraced by the descriptive phrase in its certificate, "machinery and machinery parts". The court granted the injunction, based upon its interpretation of the

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[22] *Andrew G. Nelson* v. *United States*, 355 U.S. 554, 558 (1958); *National Trailer Convoy, Inc.* v. *United States*, 240 F. Supp. 286, 288 (N.D. Okla. 1965); *Arrow Trucking Co.* v. *United States*, 181 F. Supp. 775 (N.D. Okla. 1960); *M. I. O'Boyle & Son, Inc.* v. *Houff Transfer, Inc.*, 52 M.C.C. 307, 312 (1950).

[23] See, *e.g.*, Interstate Commerce Act, 49 U.S.C. § 312(a); *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 430-31 (1947); *DeCamp Bus Lines* v. *United States*, 224 F. Supp. 196 (D.N.J. 1963).

[24] *I.C.C.* v. *Black*, 6 Fed. Car. Cas. ¶ 80,466 (N.D. Ga. 1947), *aff'd sub nom., Black* v. *ICC*, 167 F. 2d 825 (5th Cir.), *cert. denied*, 335 U.S. 818 (1948).

descriptive phrase. However, in so doing, the court stated:[25]

> [I]t is clearly proper in reaching a proper construction of any term employed in such [transportation] industry, to give consideration to its trade meaning, rather than enforce application of its general or unlimited meaning. *To do this, it is necessary for the Court to hear evidence as to such trade meaning.*

In affirming the district court's action, the Fifth Circuit emphasized:[26]

> The witness, Hagerty, *testified* that the phrase, "machinery and machinery parts," as used in appellant's certificate, *had a special limited meaning in the motor transportation industry, different from the broad, all-inclusive meaning of the words as defined in the dictionary;* that as so used the phrase was not considered by the industry to include the transportation of automobile parts. This witness was shown to be an expert in the field of property classifications as related to motor transportation, having gained this knowledge from years of experience as an Examiner of the Interstate Commerce Commission. His qualifications were neither attacked nor questioned.

In the two remaining cases cited by the District Court, the I.C.C. gave effect to long recognized practices and usage in the transportation industry regarding property classifications, rather than, as here, to its personal "opinion" as to what those practices and usage should be.[27]

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[25] *Id.*, 6 Fed. Car. Cas. at 2366 [emphasis added].

[26] *Id.*, 167 F. 2d at 827 [emphasis added].

[27] *Eclipse Motor Lines, Inc., Interp. of Certificates*, 52 M.C.C. 391, 393 (1951); *Guyott Const. Co., Inc., Ext.—Fuel Oil*, 49 M.C.C. 265, 269-70 (1949).

The additional cases relied upon by the U.S., the I.C.C., and Dance before the District Court either are inappropriate in the present circumstances, or else directly support the position of appellant.

In *U.S.A.C. Transport,*[28] the district court held that the I.C.C. properly "based its findings on *ordinary understanding* rather than scientific distinctions". The issue presented in *U.S.A.C. Transport* was whether the I.C.C. must accord controlling weight to testimony which indicates that the disputed terms have acquired peculiar meanings in the trade or industry. In that case the I.C.C. found itself unconvinced by the evidence of purported scientific or specialized meanings. Thus, it rejected that evidence on the ground that "*no good reason was advanced why ordinary meaning of words should be varied for transportation purposes.*"[29] The court upheld the I.C.C.'s action, noting that the interpretation was in accord with the definitions contained in a standard, accepted dictionary, *i.e., Webster's New Internat'l Dictionary,* (2nd ed. unabr.). Therefore, even in a case where there was some evidence of specialized meanings in the trade or industry, the I.C.C. applied ordinary meanings. So, here, where there is *no* evidence to indicate specialized meanings, the I.C.C. should have utilized the ordinary meaning of the involved terms.

In the *Simpson* case,[30] the I.C.C. expressly based its interpretation upon "expert opinion evidence" by

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[28] *U.S.A.C. Transport, Inc.* v. *United States,* 235 F. Supp. 689, 693 (D. Del. 1964) [emphasis added].

[29] *Id.,* at 692 [emphasis added].

[30] *Simpson-Inves. & Revoc.,* 84 M.C.C. 463, 465-66 (1961), *aff'd sub nom., Simpson* v. *United States,* 200 F. Supp. 372 (S.D.Ia. 1961).

industry and trade representatives adduced both in that proceeding and in an earlier proceeding involving the meaning and usage of the identical term. Further, the I.C.C. noted that its interpretation "is wholly in accord with the dictionary meaning of the term and with the views expressed in a number of technical publications and information sources known throughout the steel industry. . . ."[31] In affirming the Commission, the district court held that the I.C.C. need not decide each case involving the meaning of the identical term entirely on an independent basis but, instead, may rely upon extensive evidence presented in "a complete investigation" previously conducted.[32] Obviously, this principle does not apply to the question of first impression here.

In the *Acton* case,[33] the court expressly found that, unlike the present case, "as written the language in question is patently ambiguous". Thus, the circumstances surrounding the original grant of the certificate were considered.

In the *Mushroom* case,[34] the I.C.C. held that, upon the evidence, there was insufficient "factual foundation" to justify the "opinion" of its own Bureau of Motor Carriers that the involved term had acquired a restrictive industry or trade meaning. Instead, the I.C.C. relied upon an earlier case in which it had

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[31] *Id.*, at 467.

[32] *Id.*, 200 F. Supp. at 378.

[33] *J. B. Acton, Inc.* v. *United States*, 221 F. Supp. 174, 178 (W.D.Mo. 1963).

[34] *Mushroom Transp. Co.* v. *Midwest Emery Freight System, Inc.*, 94 M.C.C. 51, 56-57 (1963); see also, note 11, *supra*, and accompanying text.

utilized the ordinary definition of the same term from a standard, accepted dictionary, *i.e., Funk & Wagnalls New Standard Dictionary.*

In *Beaver*,[35] a restrictive interpretation of a particular commodity classification was based upon the testimony of "a traffic consultant, who has examined motor and rail classifications and commodity rate tariffs for a period of over 20 years," and who testified in that proceeding that the involved commodity was "considered as a separate and distinct commodity in the transportation industry."

In *Jones*,[36] it was recognized that a certain commodity "is ordinarily and has traditionally" been treated by industry publications and classifications "as in a class by itself apart" from the generic term presented for interpretation. On this basis, the I.C.C. found that the generic term had "a generally accepted trade and industry meaning" which did not embrace the commodity in question.

All the foregoing cases which were relied upon below (including the three cited by the District Court) are distinguishable from the present situation on an additional, common ground, to wit: those cases involved transportation of particular *commodities* which were not included within the express terms of the pertinent I.C.C. certificates. By contrast, appellant unquestionably has authority to transport the commodity "books"; the issue here concerns only from and to whom appellant may transport that commodity. Because the present interpretation relates merely to a class of shippers rather than to a class of commodities, the likelihood

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[35] *Beaver Transport Co.—Revoc. of Permit*, 64 M.C.C. 689, 690 (1955).

[36] *Jones, Ext.—Machinery & Pipe*, 52 M.C.C. 29, 31 (1950).

of any specialized or restrictive industry meanings or usage is substantially lessened. Correspondingly, the need for specific *evidence* of restrictive meanings or usage is even greater in this case.

Finally, in their joint brief before the District Court, the U.S. and I.C.C. quoted (at pp. 16-17) from six cases, in an effort to create an aura of judicial sanction about the examiner's "interpretation". Five of those cases involved construction of state taxing and licensing statutes, and the sixth involved the meaning of an alleged libelous statement. *Those cases have no bearing whatever on the evidentiary issue herein* concerning the existence or nonexistence of restrictive meanings or usage of the involved terms in the transportation industry or in the printing or publishing trades. Moreover, even though the quoted portions of the cases were lifted out of context, on their face they do not support the examiner's arbitrary substitution of "distributor" with "wholesaler" and of "dealer" with "retailer".[37]

It is clear that, in issuing appellant's certificate, the I.C.C. utilized broad, rather than narrow, language.[38]

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[37] In fact, one of the cases cited, *State* v. *J. Watts Kearney & Sons*, 160 So. 77, 78, 181 La. 554 (1934), makes clear that the term "dealer" alone is embracive of, at the very least, *both* the terms "wholesaler" and "retailer".

[38] In the past, the I.C.C. frequently has employed the narrower terms "wholesaler" and "retailer" in motor carrier certificates. See, *e.g.*, *O. C. Wiley & Sons, Inc.,—Inves. & Revoc. of Certificates*, 106 M.C.C. 686 (1968); *Interstate Grocery Distrib. System, Ext.—Paper & Paper Articles*, 98 M.C.C. 546 (1965); *Momsen—Investigation & Revocation of Certificates*, 88 M.C.C. 343 (1961); *Houff Transfer, Inc., Revocation of Certificates*, 78 M.C.C. 275 (1958); *Peterson—Interpretation of Certificate*, 73 M.C.C. 389 (1957); *Houff Transfer, Inc.—Interpretation of Certificate*, 69 M.C.C. 574 (1957); *Farm to Market Carriers, Inc. v. Elliott*, 67 M.C.C. 358 (1956).

The I.C.C. certainly should not now be permitted, by the simple expedient of substituting words, to arbitrarily change and revoke the unambiguous language originally contained in that certificate. Yet, this is precisely what the lower court has allowed.

II. THE ACTION IN SHIFTING THE BURDEN ONTO APPELLANT TO DISPROVE THE CHARGES BROUGHT AGAINST IT WAS ARBITRARY AND A DENIAL OF DUE PROCESS

It must be emphasized that the present appeal arose from an I.C.C. complaint proceeding.[39] As such, this case does not involve an *abstract* interpretation of appellant's certificate. Rather, it involves interpretation only insofar as necessary to apply the terms in that certificate to the precise factual circumstances raised by Dance's complaint. Thus, even if the I.C.C.'s modification of the certificate were proper "interpretation", the order appealed from should be reversed for the reason that the I.C.C. applied the terms in the certificate (as "interpreted" by it) without regard for the absence of facts in the record necessary to establish the allegations in the complaint.

We now point out that, in sustaining the complaint, both the I.C.C. and the court below not only disregarded the lack of supporting evidence, but actually placed upon appellant the burden of *disproving* the charges against it. Such action was contrary to controlling principles, patently arbitrary, and a deprivation of appellant's property without due process of law.

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[39] The court below completely overlooked the nature of the complaint proceeding *qua* complaint proceeding. See pp. 39-41, *infra*.

A. The Complaint Was Sustained by Switching the Burden of Proof Onto Appellant

The rule long has been recognized and applied that, in an I.C.C. complaint proceeding, the burden of proof is upon the complaining party to establish all the material allegations in its complaint.[40] As the I.C.C. has stated:[41]

> [T]he burden is upon the complainant to establish its allegation by competent evidence, and it is not relieved of this burden by the failure of the defendants to introduce evidence.

In the present case, Dance, as the complaining party, did not satisfy the burden of proof which rested upon it.

The cease and desist order issued against appellant rests upon the I.C.C.'s conclusion, *inter alia,* that the sole consignor—Kingsport Press, Inc.—of the 11 shipments of books complained of by Dance is *not* a "dealer" or "distributor" of magazines. However, what little evidence bears upon the shipping activities of Kingsport Press does not establish that this consignor is not a "distributor" of certain of its magazines. Even assuming, *arguendo,* that the evidence is insufficient to demonstrate that Kingsport Press *is* a magazine "distributor", the fact remains that Dance failed to meet the burden of proof regarding a material allegation in its complaint. It follows that, in issuing

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[40] *Blue Line, Inc.* v. *Short Line of Conn., Inc.,* 88 M.C.C. 201, 204 (1961); *P. B. Mutrie Motor Transp., Inc.* v. *Lang Storage & Transfer,* 84 M.C.C. 164, 168 (1960); *Leonard Bros. Transfer & Storage Co., Ext.—Trailers,* 82 M.C.C. 623, 628 (1960).

[41] *Monumental Motor Tours, Inc.* v. *The Greyhound Corp.,* 79 M.C.C. 244, 248 (1959); see also, *Central R.R.* v. *Bedway Trucking Co.,* 68 M.C.C. 281, 283-84 (1956), *rev'd on other grounds as to certain defendants,* 74 M.C.C. 806 (1958).

its order, the I.C.C. effectively *switched* the burden of proof, without any rational basis, from Dance onto appellant to establish that the 11 shipments were transported within the scope of the certificate. The I.C.C. did not advance any reason, and none was suggested by the court below, for departing from the established rule that the burden of proof rests upon the complaining party.

The reversal of the burden of proof relates also to three of the consignees of the 11 shipments. The examiner found that one of those consignees[42] was shown to be only a "possible" magazine "distributor" or "dealer" (p. 16a). As the evidence was not regarded as sufficient to establish that that consignee *is* a magazine "dealer" or "distributor", the examiner adopted the negative proposition. Again, the I.C.C. tacitly placed upon appellant the burden to refute the allegations in Dance's complaint. This action was entirely arbitrary.

B. The Findings Made to Sustain the Complaint Are Not Supported by the Evidence

The most liberal reading of the record reveals not even a scintilla of evidence to support the I.C.C.'s finding that Kingsport Press, the consignor of the 11 shipments of books, is not a "distributor" of magazines. As appellant's certificate requires only that the consignor *or* the consignee of each shipment be a "dealer" or "distributor" of magazines, *the absence of evidence with respect to Kingsport Press alone warrants reversal of the I.C.C. order.*

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[42] With regard to two of the consignees, the I.C.C. and the District Court relied upon testimony presented in *another* proceeding. The effective switch in the burden of proof which is inherent in this approach is discussed at pp. 30-33, *infra*.

The District Court ignored the lack of evidence regarding Kingsport Press. The court merely assumed (pp. 3a, 5a), as did the examiner (p. 16a),[43] that that consignor is not a magazine "distributor" because, in *some* cases, it performs "contract" printing for various publishers, and ships the publications which it prints in accordance with the instructions of the publishers.[44]

Only two witnesses were called by Dance at the hearing on the complaint. One witness testified that he was not an employee of Kingsport Press, was not authorized to appear on its behalf, and, more importantly, was *not familiar* with the methods used by Kingsport Press to ship the magazines and other publications which it prints.[45] Despite this fatal lack of qualifications, and over the objections of appellant, the

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[43] The examiner expressly noted that the evidence relating to Kingsport Press was "very meager" (pp. 13a, 16a).

[44] The examiner erroneously stated that appellant "considers Kingsport Press a magazine distributor by virtue of the fact that it mails the publications in accordance with its contractor's instructions." (p. 14a) Appellant's Assistant General Manager testified, in response to the question whether Kingsport Press ships its magazines under instructions from others that "I do not know. I presume they do it for themselves." (Tr. 39.) ["Tr." refers to the transcript before the examiner.] While the witness also stated that the fact of "contract" printing—*if* it were a fact—would make no difference (Tr. 24, 35-36), it was never shown that Kingsport Press in fact is strictly a "contract" printer.

[45] Tr. 52, 54-56, 58, 61-62. It should be noted that, despite the significance of the nature of Kingsport Press' business to the allegations of the complaint, *no representative* of that concern was called as a witness by Dance. Though Dance's request that an officer of Kingsport Press appear and testify allegedly was declined (see p. 13a, n. 2), Dance had available to it the full powers of administrative process to compel by subpoena the attendance of such a witness. *E.g.*, Interstate Commerce Act, 49 U.S.C. §§ 12(1) & 305(d).

I.C.C. accorded controlling weight to this witness' bald statement that Kingsport Press ships its publications only under instructions from its customers, the publishers (Tr. 55). Significantly, the witness admitted that Kingsport Press does ship the magazines which it prints.[46] Even assuming that, under the examiner's "interpretation" of appellant's certificate, the fact of "contract" printing and shipping disqualifies Kingsport Press as a "distributor" with respect to those magazines of which the witness possibly had some knowledge, the witness admittedly had *no* knowledge regarding the method by which *other* magazines are printed and shipped by Kingsport Press (Tr. 55-56, 58, 62). It simply was not shown that Kingsport Press distributes *all* its magazines under instructions from publishers.

The other witness called by Dance (appellant's Assistant General Manager) testified that, before appellant performed any of the transportation, he personally investigated Kingsport Press and found that it actually prints and distributes a number of magazines.[47] Moreover, the 1965 Annual Report of Kingsport Press, the only other pertinent evidence introduced by Dance, is fully consistent with the proposition that that consignor is a "distributor" of magazines, even under the I.C.C.'s restrictive "interpretation" of that term.[48]

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[46] Tr. 55, 58, 61. The evidence shows that Kingsport Press prints and ships, *inter alia*, "Metals Engineering Quarterly", "Philosophy East and West"—with neither of which was the witness familiar (Tr. 55-56)—"The Men in Their Flying Machines" and "The Great Race" (Tr. 34-35).

[47] Tr. 33-34, 38-39, 44.

[48] See Exhibit 2 before the hearing examiner, p. 18.

The absence of evidence in the record is not peculiar to the consignor; it applies also to three of the five involved consignees.[49] By contrast with the evidence indicating that three of the consignees *are* "dealers" or "distributors" of magazines,[50] Dance presented no evidence in the complaint proceeding to prove its allegations in this regard. This lack of evidence is highlighted by the fact that Dance, the U.S., and the I.C.C. relied before the District Court upon evidence adduced in another proceeding to sustain the Commission's findings with respect to two of the three consignees (see pp. 30-33, *infra*).[51] With respect to the third consignee, the examiner recognized that it *possibly* is a "distributor" of magazines (p. 16a)[52]—which is en-

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[49] Appellant's investigation disclosed that two of the five consignees are not magazine "dealers" or "distributors" (Tr. 30-31). However, *all* of the transportation complained of was performed under the theory that the consignor, rather than the consignees, fitted the terms of the restriction in appellant's certificate (Tr. 38-39, 44).

[50] Tr. 31, 41-43. Two of the three consignees sell magazines entitled "Ideals" and "Home Life, Christian Family Magazine" (Tr. 41-42). The third sells a magazine entitled "Commonweal" (Tr. 43). Moreover, the evidence does not indicate that these are the *only* magazines sold by these three establishments.

[51] As pointed out by Dance, the examiner also relied upon extraneous evidence to support his findings (Tr. of oral argument, pp. 74-75). Even so, at least one judge noted "the very scant reference" which the examiner made to the "actual facts" regarding these two consignees (*Id.* at 65). This lack of evidence is discussed, *infra*, at pp. 34-35.

[52] Tr. 31. The District Court evidently regarded the evidence of this "possibility" as "no evidence" that this consignee distributes magazines (Tr. of oral argument, pp. 66-68). It disregarded the fact that there was no evidence to establish the contrary proposition, upon which Dance had the burden of proof.

tirely different from demonstrating that this consignee is *not* a "dealer" or "distributor" of magazines.

It is obvious that the I.C.C. and the court below lost sight of the nature of the proceeding in sustaining the complaint against appellant. In so doing, they arbitrarily reversed the burden of proof onto appellant.

C. Consideration of Evidence From Another Proceeding Further Prejudiced Appellant

The District Court considered, over objection,[53] evidence which was presented in another proceeding, *where the burden of proof was entirely different than that in the complaint proceeding,* as support for the cease and desist order. Even though, as we point out, *infra,* (pp. 33-36), the evidence so considered actually does not furnish the needed support, the use of that evidence aggravated the prejudice already caused appellant by the reversal of the burden of proof.

The application or modification proceeding, as already noted, was initiated by appellant for the purpose of eliminating from its certificate the restriction that magazines, books, and periodicals must move "to or

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[53] The court's statement that appellant "consented" to the submission of evidence from the application proceeding (p. 5a) is contrary to fact. At the oral argument, counsel for appellant resisted the introduction of any such extraneous evidence (see Tr. of oral argument, pp. 47, 54-56, 83). Only upon the court's authorizing the filing of additional testimony (*Id.*, pp. 82-84, 112) did appellant submit its own designation; however, appellant's letter transmitting this material made clear that appellant, "in submitting this abstract, still takes the position that the evidence introduced in the modification case is not pertinent to the issues raised before the Court concerning the complaint proceeding" [letter to Clerk of Dist. Ct., dated November 15, 1967].

from magazine dealers and distributors." [54] As appellant conducted all the transportation complained of under the theory that Kingsport Press is a "distributor" of magazines, the application proceeding related only to shippers other than Kingsport Press. The burden of proof in that proceeding, as recognized by the examiner (p. 24a), was *upon appellant* to demonstrate that the proposed modification of its certificate would be responsive to a public purpose or need.[55] Unlike the complaint proceeding, wherein appellant was not obliged to present any evidence to support a decision in its favor, it was incumbent upon appellant in the application proceeding to go forward with proof in support of its proposal.

All parties, as well as the District Court, expressly recognized that the order in the application proceeding is not a subject of the present appeal.[56] Yet, the U.S., I.C.C., and Dance relied extensively in the court below upon evidence presented in that proceeding.[57] The only justification advanced therefor was that both Dance's complaint and appellant's application were consolidated by the I.C.C. for hearing and decision, were heard in sequence on the same record, and were

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[54] None of appellant's other operating authorities to transport those commodities, in interstate or intrastate commerce, contain any restriction.

[55] *E.g., Clapps Ext.—Alternate Route,* 79 M.C.C. 370, 373 (1959); *Texas & Pac. Motor Transport Co.—Keypoint Restric.,* 69 M.C.C. 335, 338 (1956); *Childress—Elimination Sanford Gateway,* 61 M.C.C. 421, 428 (1952); *Pan American Buslines Operations,* 1 M.C.C. 190, 203 (1936).

[56] Jt. Br. of U.S. and I.C.C., p. 3; Br. of Dance, p. 2; Op. of Dist. Ct., p. 1a.

[57] Jt. Br. of U.S. and I.C.C., pp. 17-18, 20-21; Br. of Dance, pp. 26-29, 34-40, 43.

decided by the examiner in a joint report.[58] Despite strenuous objection by appellant, the District Court allowed the extraneous evidence to be received.[59] Moreover, the court expressly relied upon that evidence in affirming the cease and desist order (p. 6a).

The court's consideration of evidence presented by appellant in the application proceeding in satisfaction of Dance's burden of proof in the complaint proceeding constitutes a further reversal of the burden of proof onto appellant. Appellant was entitled to, and did, refrain from presenting evidence in opposition to the complaint in order to require that Dance substantiate by competent evidence the charges which it made.[60] The action of the court visits a harsh penalty upon appellant merely because it sought to support its application to remove future interpretative problems relating to the restrictive language in the certificate. Appellant's evidence in a distinct proceeding and separate docket which, but for the I.C.C.'s own order consolidating the hearings on a joint record, would have been heard and decided separately, should not enure

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[58] Tr. of oral argument, pp. 45-46, 48, 50-57, 74-78. Regarding the contention that appellant *intended* the evidence presented in the application proceeding to bear upon the complaint proceeding, see pp. 35-36, *infra*.

[59] Tr. of oral argument, pp. 6-7, 53, 56-57, 80-85, 112.

[60] It should be noted that, besides the application for modification, appellant filed with the I.C.C. a petition for interpretation of its certificate. This petition also was consolidated with the complaint and the application. At the hearing, it was ruled that the interpretation proceeding would be heard first of the three. When appellant's protestations to this procedure as a switch of the burden of proof were rejected, appellant withdrew its petition for interpretation, leaving only the complaint and modification proceedings for hearing [see Tr. 6-12].

to the benefit of a complaining party which failed to satisfy its requisite burden of proof.

D. The Complaint Is Not Supported by Any of the Evidence Considered

Careful review of the evidence in the application proceeding which was relied upon by the U.S., I.C.C., and Dance in the court below reveals that it either is irrelevant to the issues in the complaint proceeding or else does not furnish any factual basis for the I.C.C.'s conclusions. More specifically, the extraneous evidence includes the following categories:

(1) Testimony by appellant's Assistant General Manager regarding his understanding of the ordinary meanings and usage of the terms "dealer" and "distributor".[61] This testimony fully supports the position of appellant that the involved terms should be accorded their ordinary, accepted dictionary meanings.[62] Moreover, this testimony highlights the absence of contrary evidence that the involved terms have acquired restrictive meanings in the transportation industry or in the printing or publishing trades.

(2) Testimony by a representative of a printing establishment (Meredith Press), which was characterized by the U.S., I.C.C., and Dance as relating to "trade usage" of the term "distributor".[63] At most,

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[61] Jt. Br. of U.S. and I.C.C., pp. 17, 20; Br. of Dance, pp. 34-40.

[62] On cross-examination by opposing counsel, Mr. Brown gave the following definitions:

"Magazine dealer"—one who sells wholesale or retail or has a financial connection with the magazines (Tr. 228-29).

"Magazine distributor"—one who sells, mails, ships, or otherwise distributes magazines (Tr. 223-24).

[63] Jt. Br. of U.S. and I.C.C., p. 17; Br. of Dance, p. 43.

this testimony indicates only that the term "wholesaler" may be included within the broader term "distributor"; it certainly does not establish that the latter term is restricted in scope to the former. More importantly, the witness himself was introduced in the application proceeding for the sole purpose—and none other—of demonstrating a need for appellant's proposed services. He was qualified to testify only with respect to his general understanding of a particular establishment. The witness was never qualified to testify with respect to trade practices or with respect to the meaning and usage of particular terms on an industry-wide basis. The fallacy with the lower court's approach is that it considered this testimony from the application proceeding for *an entirely different purpose* from that for which it was introduced. This action further prejudiced appellant, even beyond the reversal of the burden of proof, already mentioned.

(3) Testimony by a representative of the Atlanta Baptist Book Store.[64] This is the testimony which was relied upon by the examiner (p. 17a) and the District Court (pp. 4a-6a) to support the conclusion that the Atlanta store, as well as the Birmingham store, "obviously" are not magazine "distributors" and, in the examiner's personal "opinion", are not magazine "dealers". The witness testified that both book stores sell many publications which he regards as magazines.[65] The witness also testified that, while he does not consider the *Atlanta* store to be "pri-

[64] Jt. Br. of U.S. and I.C.C., p. 21; Br. of Dance, pp. 26-29.

[65] See I.C.C. Exhibit 1 in Dist. Ct., p. 26. Counsel for the I.C.C., U.S., and Dance agreed to the accuracy of the factual statements made in that exhibit. See Tr. of oral argument, pp. 56-57, 80.

marily" a magazine "dealer", he does consider that store to be a magazine "dealer".[66] It must be emphasized, once again, that Dance had the burden of proving that *both* the Atlanta and Birmingham book stores are not magazine "dealers" or "distributors". Dance did not call a witness from either establishment. The only evidence to which Dance refers was presented by appellant in the application proceeding, and shows that *both* book stores sell magazines, though *one* of them is not engaged "primarily" in magazine sales. Even if it were proper to consider this evidence, it certainly does not weigh toward satisfaction of Dance's burden.

(4) Testimony by a representative of the Georgia Cumberland Book and Bible House which, it is alleged by Dance, *ipse dixit,* demonstrates that the witnesses introduced by appellant in the application proceeding were intended for use "as evidence in opposition to the complaint case."[67] However, the testimony shows on its face the purpose for which it was presented, to wit: to the extent that the shippers served in the past by appellant present difficult problems of interpretation under the terms of the restriction in appellant's certificate,[68] does the public convenience and necessity

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[66] Tr. 373-374; quoted by the District Court at p. 6a.

[67] Letter dated November 20, 1967, to Clerk of District Court from counsel for Dance, transmitting copy of testimony by Ira C. Pound, Jr.

[68] Appellant has served many shippers besides Kingsport Press under its certificate. However, based upon its earlier investigation of Kingsport Press, appellant was satisfied that that shipper qualified as a "distributor" of magazines (Tr. 44). As appellant considered itself clearly authorized to serve Kingsport Press, its purpose for initiating the application proceeding related only to those other shippers whose activities were not so clearly those of magazine "distributors" or "dealers".

warrant appellant's proposed operations in the transportation of magazines, books, and periodicals, unrestricted by the class of shippers which are served? Obviously, this question embraces within it the narrower question of interpretation involved in the complaint proceeding; but this fact does not justify consideration of the other record, where the burden of proof was on appellant, as bearing upon the evidence required to be presented by Dance to sustain its complaint. Appellant's principal theory in the complaint proceeding was that its service for Kingsport Press was authorized. As Dance did not demonstrate that Kingsport Press is not a "dealer" or "distributor" of magazines, there was no need or purpose for appellant to present evidence in rebuttal of this proposition—and, indeed, it did not present any evidence. The seven public witnesses which appellant introduced in the application proceeding were intended to show a public need for the proposed service, not to demonstrate the legality of past services.

Even the extraneous evidence considered by the I.C.C. and the District Court does not lend support to the cease and desist order. To the contrary, that evidence serves merely to emphasize the arbitrariness of the action below.

III. THE DISTRICT COURT DID NOT ADEQUATELY CONSIDER THE ISSUES AND BASED ITS OPINION UPON A MISUNDERSTANDING OF THE PROBLEM

The opinion below manifests such a total failure by the court fairly to grasp and determine the issues before it as to constitute a breach of its statutory duties and functions on review.[69] Not even a footnote refer-

[69] See Administrative Procedure Act, 5 U.S.C. § 706; Judicial Code, 28 U.S.C. §§ 1336, 2284, & 2325.

ence is made in that opinion to the burden of proof in a complaint proceeding or to the necessity for evidence to establish restrictive "commercial" meanings or usage in interpreting motor carrier authorities. A casual reading of the opinion reveals that the court simply applied a "rubber stamp" of approval to the I.C.C. order, without regard for the existence or absence of criteria necessary for judicial affirmance. This fact alone calls for reversal of the court's judgment.[70]

The District Court ignored—as did the examiner and the I.C.C.—the controlling rule of interpretation that language contained in operating authorities must be accorded its ordinary, accepted dictionary meaning *unless* a more restrictive or specialized usage is shown to apply in the transportation industry or in the particular trade involved. While the court certainly was correct in stating "that in transportation parlance through common usage certain terms and phrases take on a much more restrictive meaning" (pp. 5a-6a), the court disregarded the *absence of any evidence* in this case that the specific terms "dealer" and "distributor" have acquired restrictive meanings or usage in the transportation industry. Similarly, the court disregarded the lack of an evidentiary basis for the *particular* restrictive meanings which were devined through the personal "opinion" of the hearing examiner.

The court did not even focus upon the definitions which were utilized by the examiner and the I.C.C. It simply stated (p. 3a):

> In the brief of Dance and other protestants the word "distributor" is equivalent to a "whole-

[70] *E.g., NLRB* v. *Brown*, 380 U.S. 278, 291 (1965); *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962); *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954).

> saler" and is defined as "one who buys goods from importers or producers and sells to retailers, thus a middleman", citing Encyclopedia Dictionary of Business as authority for that definition.

The court declined to come to grips with the substitution *by the I.C.C.* of the term "wholesaler" for "distributor" and of "retailer" for "dealer". Only in the I.C.C.'s further refinement of the term "dealer" with some vague semblance of a "primary business" doctrine did the court become unsettled (pp. 6a-7a):

> The Commission in ruling that Baptist Book Store was not a "magazine dealer" did not lay down any rule or standard by which the matter could be determined in the future, that is to say, it did not state whether a business concern in order to be classed a magazine dealer must sell any magazines, or a substantial amount of magazines, or should be primarily a dealer in magazines, or should be commonly known to the public as a magazine dealer.

However, the court continued to "rule without hesitancy" that the I.C.C. did not commit any error (p. 7a).

That the District Court completely missed the critical interpretative issue before it is demonstrated by the above *non sequitor*. The only aspect of the I.C.C.'s "interpretation" which troubled the court was that, in one of its details, the "interpretation" did not extend far enough. Thus, the court would have been contented if the I.C.C., *without any evidentiary basis whatsoever,* had "interpreted" the term "dealer" to mean, *e.g.,* "a retailer whose magazine sales constitute at least 51.44% of its overall business".

Moreover, the nature of the case as an I.C.C. complaint proceeding escaped the court entirely. The court erroneously stated, as its basic premise (p. 2a):

> [T]his Court must affirm said order if it [the I.C.C.] placed the proper interpretation upon the certificate in question.

Obviously, the District Court regarded the proceeding as an abstract "interpretation" of the terms in appellant's certificate, rather than as an adjudication of the charge by Dance that appellant furnished transportation services on 11 specific occasions without appropriate authority. Not even a hint may be found in the court's opinion regarding the burden of proof in a complaint proceeding. It is hardly surprising, therefore, that the court saw no evil in extracting evidence from another record—where the burden of proof was on appellant rather than on Dance—to sustain the complaint.

Additionally, the court circumvented the issue pertaining to Kingsport Press, the sole consignor of the 11 shipments of books. The court stated that the question

> turns upon the meaning of the phrase "magazine dealers and distributors" principally, as it may be sought to be applied to the *consignees* of these shipments. [p. 2a; emphasis added]

The court disregarded the fact that all the shipments were transported by appellant under the theory that the *consignor* is a magazine "distributor";[71] and that

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[71] For example, the court was careful to note that appellant "conceded" that shipments to two consignees "were not shipments to either dealers or distributors." (p. 4a) However, it failed to note that these same shipments moved from Kingsport Press, which *is* a magazine "dealer" or "distributor". At best, the court looked at only half the picture.

the burden was upon Dance to establish that the consignor is not a magazine "distributor". The court merely quoted (in a footnote) from the examiner's report, wherein the conclusion that Kingsport Press is not a "distributor" expressly was based upon "the opinion of the examiner" regarding the meaning of that term, rather than upon any factual information (p. 3a). Thus, without so much as a word of discussion, the court was "clear in our opinion" that Kingsport Press properly was found by the I.C.C. not to be a magazine "distributor" (p. 5a). While two "opinions" may be better than one, in this case they can not remedy the lack of necessary evidence.

Turning to one of the consignees, St. Joseph High School, the court quoted from the examiner's statement that this consignee is not a magazine *distributor* in support of the entirely different proposition that it is not a magazine *dealer* (p. 5a). Further, the examiner's conclusion expressly was based, again, upon "the opinion of the examiner" that the term "distributor" should be accorded a restrictive meaning. While the examiner may be gratified to know that three judges "believe" his personal "opinion" to be "justified" (p. 5a), there remains the fact that the examiner's interpretation is wholly unsupported by evidence or by a rational basis.

With regard to the consignees Atlanta and Birmingham Baptist Book Stores, the court quoted *twice* from the *same* portion of the examiner's report which states that these consignees "obviously" are not magazine "distributors" and, "in the opinion of the examiner", are not magazine "dealers" (pp. 4a, 5a). Evidently the court regarded the examiner's statement as acquiring weight through repetition. It certainly did not recognize any necessity for evidence of industry or

trade practices to support a restrictive usage of the term "dealer". Moreover, the court conveniently solved the problem that the only evidence bearing upon this aspect of the case appears of record in appellant's application proceeding: the court stated that appellant "consented" to the consideration of evidence from that proceeding. Yet, at the oral argument, the following exchange occurred: [72]

> JUDGE SMITH: You're not stipulating its admissibility, if that's what is bothering you.
>
> MR. SUTHERLUND: That is what is bothering me.
>
> JUDGE TUTTLE: Oh, no, we understand.

The only possible explanation for the court's about-face is that it believed appellant was objecting to *the I.C.C.'s* admission of the evidence in the application proceeding itself. In this regard, the court stated (p. 5a):

> No error was committed by the Commission in admitting the testimony by Ira C. Pound, Jr., James H. Brown and Robert Mendenhall therein complained of.

However, all three of the named witnesses appeared on behalf of appellant in the application proceeding. At no time has appellant objected to the I.C.C.'s receipt and consideration of appellant's *own* evidence for purposes of passing upon its application for modification of the certificate. Manifestly, the court's failure to comprehend the issues is appalling.

Further, the District Court misconstrued appellant's contention relating to the so-called "doctrine of the last antecedent." Although it was explained to the

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[72] Tr. of oral argument, p. 83; see also note 53, *supra*, wherein is further discussed appellant's strenuous objection to the court's consideration of extraneous evidence.

court that this doctrine was raised merely incidentally, to confirm that the examiner's "interpretation" is improper under all applicable rules,[73] the court elevated the doctrine to "the *first* contention" made by appellant, and proceeded to reject it summarily, upon "a mere casual reading", without any deference whatever to its status as a grammatical rule of law. (p. 2a; emphasis added).[74]

The doctrine of the last antecedent itself states that a qualifying or restrictive phrase may be applied only to the antecedent word or phrase which it can reasonably modify; that if the qualifying phrase is intended to relate to more than the "last antecedent", a comma is used to set off the modifier from the entire series.[75] Under this rule, which recently has been held to be determinative in interpreting I.C.C. certificates,[76] the absence of a comma after the term "periodicals" in appellant's authority means that the qualifying phrase "consigned to or from magazine dealers and distributors" modifies only the last antecedent ("periodicals"), rather than all three antecedents ("magazines, books, and periodicals"). Thus, the doctrine in this case serves to emphasize that appellant's interpretation of its certificate conforms in all respects with *ordinary* meanings and usage, as well as with the reasonable

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[73] Tr. of oral argument, p. 39; see also *Id.* at 69, where Smith, J., stated "He [counsel for appellant] says he doesn't really rely on that, that he just throws that in as a 'chaser', to shore up the position that is taken otherwise."

[74] See, *e.g.*, *FTC* v. *Mandel Bros.*, 359 U.S. 385, 389 (1959); *United States* v. *Hughes*, 116 F.2d 613, 616 (3d Cir. 1940).

[75] See 82 C.J.S. Statutes § 334 (1953); 50 Am. Jur. Statutes § 269 (1944); 2 SUTHERLAND, STATUTORY CONSTRUCTION, § 4921 (3rd ed. 1943).

[76] *T. I. McCormack Trucking Co.* v. *United States*, 251 F. Supp. 526, 534 (D.N.J. 1966); *Road Paving Materials Between Points in New England*, 329 I.C.C. 199, 203-04 (1966).

expectations of a layman shipper.[77] The significance of the doctrine—as with the significance of most everything else—escaped the court below.

At most, the opinion of the District Court evidences a total failure to grasp and consider the issues presented, with considerable resulting prejudice to appellant. The court has allowed the I.C.C. to revoke appellant's operating authority under a guise of "interpretative" action and, on this basis, to rule that appellant conducted unlawful operations. Additionally, the court has permitted the I.C.C. to reverse the burden of proof in a complaint proceeding, completely contrary to established precedent and without any rational basis, onto the very party whose activities were made the subject of challenge.

CONCLUSION

For the foregoing reasons the questions presented by this appeal are substantial. In view of the breakdown of administrative and judicial processes and functions below, the Court should exercise its jurisdiction to correct the judgment of the lower court.

Respectfully submitted,

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March 26, 1968

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[77] See *McCormack, supra* note 76, at 534.

APPENDIX

Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 10985

THEATRES SERVICE COMPANY, *Plaintiff*

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants*

DANCE FREIGHT LINES, INC., *Intervenor*

Before TUTTLE, Circuit Judge, SMITH, District Judge, and HOOPER, Senior District Judge.

PER CURIAM.

STATEMENT OF THE CASE

The plaintiff, Theatres Service Company, is moving to strike and avoid an order of the Interstate Commerce Commission.

This order followed the recommendation of the Trial Examiner and granted a petition filed by Dance Freight Lines, Inc. seeking an order requiring Theatres Service Company to cease and desist transporting goods over routes as to which Dance held a certificate.

Another order, seeking to amend the certificate held by this plaintiff, is not complained of.

I. Concerning Unauthorized Transportation By Theatres Service Company

The Examiner found that in No. MC-C-4892 the transportation by Theatres Service Company of books for Kingsport Press, Inc. of Kingsport, Tennessee to the consignees was not authorized by the certificate of Theatres Service No. MC-65697, Sub-number 2, which authorizes the transportation of books "consigned to or from magazine dealers and distributors," and recommended that Theatres Service should be ordered to cease and desist from such transportation.

The Commission followed the recommendation of the Examiner, and this Court must affirm said order if it placed the proper interpretation upon the certificate in question.

1—The certificate authorized transportation by Theatres Service as follows:

> "*Newspapers* and newsprint stock consigned to, or consigned from, theatres or newspaper publishers, and *magazines, books, and periodicals, consigned to, or from, magazine dealers* and distributors, between Atlanta, Georgia and points in Alabama, Tennessee and Georgia", (Italics supplied)

over routes thereinafter specified.

The first contention made by the plaintiff is that the language contained in the above, to-wit: ". . . consigned to, or from, magazine dealers and distributors," had reference only to "periodicals" and did not have reference to "books". A mere casual reading of the quoted portions above shows beyond any doubt that the quoted phrase covered "magazines, books and periodicals."

2—The next contention by Theatres Service turns upon the meaning of the phrase "magazine dealers and distributors" principally, as it may be sought to be applied to the consignees of these shipments. The finding by the

Commission that Kingsport Press, consignor, is neither a dealer nor a distributor is covered below.[1]

In the brief of Dance and other protestants the word "distributor" is equivalent to a "wholesaler" and is defined as "one who buys goods from importers or producers and sells to retailers, thus a middleman", citing Encyclopedia Dictionary of Business as authority for that definition.

These parties also point out that the terms above referred to are ambiguous and that it is necessary for a lawful interpretation to consider the circumstances surrounding its grant. As a matter of fact, what the Commission was really called upon to do in this case was to interpret and define, and to apply, the language in what had previously been assigned to Theatres Service.

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[1] Such report contains the following:

"Kingsport Press, as well as numerous other printers, are served by defendant as magazine distributors on the theory that they are engaged in distributing the magazines on behalf of their customers, the publishers, who specify the consignees and the quantities for each. This obviously involves an application of the literal definition of 'distributor' as one who distributes or disperses articles, among others. In the opinion of the examiner this is a wholly unrealistic construction of the term, and one which goes far beyond the ordinary commercial usage of the term to describe one who generally acts as a middleman in the marketing of goods by purchasing them from various dealers who in turn deal with the ultimate consumer. Although the evidence relating to Kingsport Press is meager, it clearly establishes that in spite of the fact that it is engaged in printing magazines, that company is not a magazine distributor within the meaning of defendant's Sub 2 authority under consideration here. Nor is it a magazine dealer, i.e., one who deals in magazines at the retail level."

The report further stated:

"The witness for defendant attempted a definition of 'magazine distributor' as one who distributes magazines by selling, mailing or shipping."

II.

The Examiner stated:

> "Whether the shipments involved in the complaint proceeding were within defendants authority depends upon whether the consignees involved were magazine dealers or distributors."

Eleven shipments were involved and ruled upon as follows:

It was conceded that three shipments of text books made to Georgia School Book Deposit in Atlanta for distribution to public schools of Georgia, and four shipments of text books to Allen & Bacon, Inc. in Atlanta were not shipments to either dealers or distributors.

Two shipments of hymnals to Baptist Book Store in Atlanta and one shipment of the same to Baptist Book Store in Birmingham were fully discussed by the Examiner who reported as follows:

> "The Baptist Book Stores are operated by the Baptist Sunday School Board which also operates separate departments or divisions for publishing, printing, selling, and distributing books and magazines. In spite of the fact that some of the publications sold by the Book Stores might be characterized as magazines, and the fact that the witness who operates the Atlanta store considers it to be a distributor and dealer of magazines, these stores are not properly classified as such. They are obviously not magazine distributors and, in the opinion of the examiner, are not magazine dealers. The magazines published and printed by divisions of the Sunday School Board are not distributed through the Book Stores for sale to the public. Only one or two publications described as being sold by the Atlanta store may possibly be classified as magazines. In the commercial sense, by which we must be guided here, the Book Stores are in no wise magazine dealers."

Subsequent to oral argument counsel for intervenor has submitted to this Court copy of transcript of the hearing before the examiner which opposing parties by letter to this Court have consented to be added in evidence, and the Clerk is directed to so enter the same as intervenor's Exhibit #1. No error was committed by the Commission in admitting the testimony by Ira C. Pound, Jr., James H. Brown and Robert Mendenhall therein complained of.

As to the single shipment of books to St. Joseph High School in Atlanta, the report stated:

> "The latter school is served as a 'possible' magazine distributor on the theory that 'so many of the school systems' do distribute magazines. Here again, defendant is applying a literal construction of the term 'distributor' and is, in the opinion of the examiner, in error in so doing."

We are clear in our opinion that the Commission was amply justified in its ruling that Kingsport Press, Inc. is not a distributor. We also believe and find the Commission was justified in finding that the organization operating under the auspices of St. Joseph High School in Atlanta was not a magazine dealer.

As To Baptist Book Store

The findings of the examiner included the following:

> "The Baptist Book Stores * * * are obviously not magazine distributors and, in the opinion of the examiner, * * * (i)n *the commercial sense, by which we must be guided here,* the Book Stores are in no wise dealers. (Emphasis supplied). [Hearing Examiner, 6, 71]"

In the comprehensive and enlightening brief filed by counsel for the Commission it is made clear that in transportation parlance through common usage certain terms

and phrases take on a much more restrictive meaning, separate and distinct from an academic definition of the words utilized. See *Eclipse Motor Lines, Inc.—Interpretation of Certificate*, 52 M.C.C. 391, 392; *Guyott Construction Co., Inc.—Extension Fuel Oil*, 49 M.C.C. 265, 270 and *Interstate Commerce Commission* v. *Black*, 6 Federal Carriers Cases, § 80,466, pp. 2365-2368. Many other cases could be cited to the same effect.

The testimony before the examiner of Robert Mendenhall, manager of Baptist Book Store, is revealing. The following interrogation is contained in the record:

> Q: Mr. Mendenhall, in all candor, the Atlanta Baptist Book Store is not considered by you to be primarily a distributor or dealer of magazines as such, is it?
>
> A: I would have to answer no.
>
> Q: Are you primarily—While you are primarily not a dealer in magazines or a distributor of magazines, as you have stated just a moment ago, do you consider yourself to be a dealer of magazines?
>
> Mr. Born: Now, I object to that question, Mr. Examiner. The question has already been asked and answered.
>
> Mr. Sutherlund: I think it was "primarily" your question or "as such", I'm asking him if he considers himself at all in any regard a dealer in or of magazines.
>
> The Witness: I would have to say yes.

The Commission in ruling that Baptist Book Store was not a "magazine dealer" did not lay down any rule or standard by which the matter could be determined in the future, that is to say, it did not state whether a business concern in order to be classed a magazine dealer must sell

any magazines, or a substantial amount of magazines, or should be primarily a dealer in magazines, or should be commonly known to the public as a magazine dealer. We therefore have presented to us only the narrow question as to whether the Commission erred under the facts in this record of finding that the Baptist Book Store was not a magazine dealer, and we rule without hesitancy that it did not so err.

Judgment of the Court

For reasons as set forth in the Opinion of this Court herewith filed,

IT IS ORDERED AND ADJUDGED that the prayers of the plaintiff be, and they are hereby, denied, and a judgment be, and it is hereby rendered in favor of the defendants, with costs against the plaintiff.

This the 27th day of November, 1967.

/s/ ELBERT P. TUTTLE
United States Circuit Judge

/s/ SIDNEY O. SMITH, JR.
United States District Judge

/s/ FRANK A. HOOPER
United States Senior District Judge

I.C.C. Decision and Order

Service Date
March 31, 1967

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 20th day of March, A. D. 1967.

No. MC-C-4892

DANCE FREIGHT LINES, INC.

v.

THEATRES SERVICE COMPANY

No. MC-65697 (Sub-No. 34)

THEATRES SERVICE COMPANY EXTENSION—MAGAZINES, BOOKS, AND PERIODICALS

Upon consideration of the complaint in No. MC-C-4892, the application in No. MC-65697 (Sub-No. 34), and the record in the above-entitled proceedings, including the report and recommended orders of the examiner, the exceptions thereto filed by respondent-applicant, Theatres Service Company, and the reply to the exceptions filed by complainant-protestant, Dance Freight Lines, Inc.; and

It appearing, That the exceptions and reply raise no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report by Division 1 discussing the evidence in the light of the pleadings;

It further appearing, That in No. MC-65697 (Sub-No. 34) the examiner recommended that the application for a certificate of public convenience and necessity be denied;

And it further appearing, That in No. MC-C-4892 the examiner recommended that respondent, Theatres Service Company, be ordered to cease and desist from certain operations;

Wherefore, and good cause appearing therefor:

We find, That the evidence, considered in the light of the exceptions and reply thereto, does not warrant a result different from that reached by the examiner; and that the statement of facts, the conclusions, and the findings of the examiner, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That the application in No. MC-65697 (Sub-No. 34) for a certificate of public convenience and necessity be, and it is hereby, denied; and that this order, insofar as it pertains to the said application, shall be effective on May 29, 1967.

It is further ordered, That in No. MC-C-4892, respondent Theatres Service Company be, and it is hereby, ordered and required to cease and desist forthwith, and thereafter to refrain and abstain from all operations, in interstate or foreign commerce, of the character found in the examiner's report to be unlawful.

And it is further ordered, That in No. MC-C-4892, the statutory compliance date after which respondent will be held to be in willful violation of this order shall be May 29, 1967.

By the Commission, division 1, Commissioners Murphy, Webb, and Tierney, (Commissioner Webb, not participating).

H. NEIL GARSON,
Secretary.

(SEAL)

Examiner's Report

INTERSTATE COMMERCE COMMISSION

Served August 29, 1966

No. MC-C-4892[1]

DANCE FREIGHT LINES, INC.

v.

THEATRES SERVICE COMPANY

David A. Sutherlund for defendant and applicant.

Paul M. Daniel and *Robert E. Born* for complainant and protestant.

J. C. Hutcheson, Clifford E. Sanders, Blaine Buchannan and *Bill R. Davis* for protestants.

REPORT AND ORDER
RECOMMENDED BY JAMES A. MCKIEL, HEARING EXAMINER

In No. MC-C-4892, by complaint filed September 2, 1965, Dance Freight Lines, Inc., of Cincinnati, Ohio alleges that Theatres Service Company, hereinafter called defendant or applicant, a motor common carrier of Atlanta, Ga., is and has been transporting books originating at Kingsport, Tenn., which are not authorized by its certificates inasmuch as neither the consignees nor the consignors are magazine dealers or magazine distributors. It asks that a cease and desist order be issued. Defendant, in its answer, concedes that it has transported "books" for Kingsport Press, Inc., from Kingsport to Atlanta, but asserts that such transportation is completely lawful under the terms of its certificate inasmuch as the consignor, and in certain instances the consignee, is a "magazine dealer or distributor".

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[1] This report also embraces No. MC-65697 (Sub-No. 34), Theatres Service Company Extension—Magazines, Books, and Periodicals.

In No. MC-65697 (Sub-No. 34), by application filed August 27, 1965, applicant seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of magazines, books, and periodicals between the points and over the routes described in Appendix A hereto.

The complaint and the application were referred to the examiner for hearing and the recommendation of appropriate orders thereon. Hearing was held on a consolidated record on April 18, 19 and 20, 1966, at Atlanta. The application is opposed by Tennessee Carolina Transportation, Inc., Dance Freight Lines, Inc., Mason and Dixon Lines, Incorporated, Mason and Dixon Lines, Inc., Central Motor Express, Inc., and Jack Robinson, doing business as Robinson Freight Lines.

Briefs

Briefs were filed by applicant-defendant and jointly by complainant and protestants. Matters raised on brief but not discussed herein or reflected in the findings have been considered and found not justified.

On brief, applicant-defendant alleges that the evidence clearly establishes that almost all of the books which it has transported in 1965 were within the scope of its present authority but that a grant of the considered application would "alleviate the necessity to conduct elaborate investigations and would ensure that the few questionable shipments which have been transported are within the terms of its authority." Applicant urges that the modification sought by the application should be considered in the light of criteria similar to those applied to alternate route, gateway elimination, and keypoint modification cases, namely, that operating economies and efficiencies will be effected and a new competitive service will not be instituted which would adversely affect the operations of presently authorized carriers. So considered, it urges that there is ample

justification for the proposed modification. Applicant regards the restriction in its Sub 2 certificate to be unique as "the Commission usually grants authority to transport specific commodities to the public generally or commodities generally from or to a specific class." The so-called double restriction encountered here requires applicant to conduct an investigation to first determine whether the commodity is a magazine and then whether the consignor or consignee is a magazine dealer or distributor. As defendant, it maintains that the complaint should be dismissed inasmuch as no evidence was presented by complainant to show that Kingsport Press is not a magazine dealer or distributor.

Complainant and protestants allege, on brief, that (1) the terms of applicant's certificate are ambiguous and indefinite and it is necessary for a lawful interpretation and construction thereof to consider the circumstances surrounding its grant in order to determine the true importance and meaning based upon industry or trade usage and practices and common understanding, and (2) the background and circumstances surrounding the grant of authority under consideration require that the term "distributor" be construed to mean one whose regular business is that of a wholesaler (of magazines) as that term is understood in business and trade usages and that the term "dealer" be construed to mean one who otherwise deals in (sells) magazines as a regular business. They further allege, however, that the same construction is compelled by the terms of the certificate itself. Based upon such construction, they request the following findings be made: (1) in the complaint proceeding, that the shipments involved were transported without authority and a cease and desist order be entered requiring defendant to cease and desist and thereafter refrain from transporting books or other publications from Kingsport Press to any consignee who is not a magazine dealer or distributor, and (2) in the application proceeding, that no showing of public need for the authority sought has been shown, and that applicant's fitness is in doubt in view of its unlawful transportation activities.

The Complaint Proceeding

Defendant holds authority in No. MC-65697 (Sub-No. 2) to transport, among other things, magazines, books, and periodicals consigned to or from magazine dealers and distributors between the points in Alabama, Georgia, and Tennessee, as described in Appendix B hereto. The routes are substantially the same as those sought by the Sub-No. 34 application as described in Appendix A. Pursuant to such authority, applicant has been transporting books for Kingsport Press, Inc., from Kingsport, Tenn., to Atlanta and Birmingham, which transportation is the subject matter of the complaint, it being alleged that neither the consignor nor the consignee in the specific instances cited are magazine dealers or magazine distributors. In addition, it holds authority to transport motion and sound picture films, equipment, and supplies used in the maintenance of theatres, and newspapers, books, and periodicals, over specified routes in the same States sought here, some of the routes duplicating portions of those involved here.

Although no representative of Kingsport Press, Inc., testified at the hearing,[2] testimony by Mr. Sanders (counsel for Mason and Dixon in the application proceeding herein), whose law firm has represented that company in various matters from time to time, revealed that it prints books under contract with various publishers and ships them according to the latter's instructions. Although the evidence is very meager on the subject, resort to the company's 1964 annual report to stockholders indicates that it has in the past done little magazine printing but that new equipment installed during 1964 is capable of produc-

[2] Witness for complainant requested an officer of that company to testify but he declined to do so because "He doesn't want his competitors to know what he is bidding on or what he has done in the past and he could not reveal the information without revealing what they were doing and what they were attempting to do." (Tr. pg. 252).

ing magazines as well as other printed products. Other evidence indicates that it expects to do more magazine printing in the future. It was stipulated that Kingsport Press "may sometimes in the past and may from time to time in the future print magazines."

Sometime in 1965 representatives of defendant and Kingsport Press, Inc., discussed that portion of defendant's authority under consideration here and concluded that the latter could transport books for that shipper inasmuch as it prints several "magazines", namely, two so-called regular magazines and two special magazines. The former are "Metals Engineering Quarterly," an engineering trade publication, and "Philosophy East and West", a University of Hawaii publication. Defendant's witness considers Kingsport Press a magazine distributor by virtue of the fact that it mails the publications in accordance with its contractor's instructions. The special magazines are "The Great Race" and "The Men in Their Flying Machines", which appear to be programs of the motion pictures having the same titles and which are commonly sold to patrons as they enter the theater. Pursuant to the determination that Kingsport Press is a magazine distributor, defendant transported the following shipments which are the subject to the complaint: 3 shipments of textbooks to Georgia School Book Depository at Atlanta, 4 shipments of textbooks to Allyn & Bacon, Inc., at Atlanta, 2 shipments of hymnals to the Baptist Book Store at Atlanta, 1 shipment of hymnals to the Baptist Book Store at Birmingham, and 1 shipment of educational books to Sister Mary Severine, St. Joseph High School at Atlanta. The Georgia School Book Depository, an agency of the State Board of Education, stores textbooks for distribution to the public schools of Georgia. Allyn & Bacon, Inc., is a textbook publisher with headquarters in Boston, Mass., and an office in Atlanta. The Baptist Book Stores in Atlanta and Birmingham are two of several retail book stores operated by the Baptist Church which sell religious material including

books and magazines. St. Joseph High School is a parochial school which operates on its premises the Notre Dame Book Store which sells religious material of a nature and in a manner similar to the Baptist Book Store heretofore noted.

In construing defendant's authority, the important terms, of course, are "dealers" and "distributors." Dictionary definitions are not helpful, as conceded by all parties. The witness for defendant attempted a definition of "magazine distributor" as one who distributes magazines by selling, mailing, or shipping. In the brief of complainant and protestants the following definition is cited and is considered pertinent (Encyclopedic Dictionary of Business, Prentice-Hall, Inc., New York, 1952, pages 232 and 698):

> *Distributor.* See Wholesaler.
>
> *Wholesaler.* One who buys goods from importers or producers and sells to retailers; thus, a middleman. The U. S. Bureau of Census defines two categories of middlemen—"wholesale merchants" and "functional middlemen." The following are classed as "wholesale merchants": converters, exporters, importers, cash-and-carry wholesalers, drop shippers, mail order wholesalers, wagon distributors, supply and machinery distributors. "Functional middlemen"—those who do not take title to the goods they sell—include brokers, commission merchants, export agents, import agents, manufacturers' agents, purchasing agents, sales agents.
>
> Individual trade practices determine whether the wholesaler is called a "jobber" or a "distributor". In the apparel industry wholesalers who buy finished goods from producers and sell to retailers are called jobbers. They are not limited to sales territories. But, wholesalers who have goods made to their specifications by others, and then sell to retailers, are called manufacturers.

> In most fields, the distributor functions like a company branch; he buys from producers and sells to retailers in a limited territory.

Kingsport Press, as well as numerous other printers, are served by defendant as magazine distributors on the theory that they are engaged in distributing the magazines on behalf of their customers, the publishers, who specify the consignees and the quantities for each. This obviously involves an application of the literal definition of "distributor" as one who distributes or disperses articles among others. In the opinion of the examiner this is a wholly unrealistic construction of the term, and one which goes far beyond the ordinary commercial usage of the term to describe one who generally acts as a middleman in the marketing of goods by purchasing them from manufacturers or producers and selling them generally to various dealers who in turn deal with the ultimate consumer. Although the evidence relating to Kingsport Press is meager, it clearly establishes that in spite of the fact that it is engaged in printing magazines, that company is not a magazine distributor within the meaning of defendant's Sub 2 authority under consideration here. Nor is it a magazine dealer, i.e., one who deals in magazines at the retail level. Whether the shipments involved in the complaint proceeding were within defendant's authority depends on whether the particular consignees involved were magazine dealers or distributors. Defendant concedes that two of the consignees (Georgia School Book Depository and Allyn & Bacon, Inc.) are not magazine dealers or distributors, hence 7 of the 11 shipments involved were handled without appropriate authority. The other consignees were the Baptist Book Stores at Atlanta and at Birmingham and the St. Joseph High School. The latter school is served as a "possible" magazine distributor on the theory that "so many of the school systems" do distribute magazines. Here again, defendant is applying a literal construction of

the term "distributor" and is, in the opinion of the examiner, in error in so doing. The Baptist Book Stores are operated by the Baptist Sunday School Board which also operates separate departments or divisions for publishing, printing, selling, and distributing books and magazines. In spite of the fact that some of the publications sold by the Book Stores might be characterized as magazines, and the fact that the witness who operates the Atlanta store considers it to be a distributor and dealer of magazines, those stores are not properly classified as such. They are obviously not magazine distributors and, in the opinion of the examiner, are not magazine dealers. The magazines published and printed by divisions of the Sunday School Board are not distributed through the Book Stores for sale to the public. Only one or two publications described as being sold by the Atlanta store may possibly be classified as magazines. In the commercial sense, by which we must be guided here, the Book Stores are in no wise magazine dealers. It is clear, therefore, that all of the shipments which are the subject of the complaint were transported by defendant without appropriate authority therefor.

The Application Proceeding

Although applicant believes that its Sub-No. 2 certificate as heretofore described embraces the transportation made the subject of the complaint proceeding, it seeks by the instant application to modify that certificate by eliminating the requirement that the magazines, books, and periodicals be consigned to or from magazine dealers or distributors. Its case is based primarily on the proposition that the terms "dealer" and "distributor" are ambiguous and their inclusion as limitations on the authority granted in the Sub-No. 2 certificate places an undue burden of interpretation on its personnel in many instances and thus invites unintentional violations. It made no attempt to establish public convenience and necessity in the traditional sense, its support being from present and past users of its service

and designed to establish ambiguity in the foregoing terms as well as the fact that they come within one or the other of such classifications and hence can now be served by applicant. The considered authority now contained in the Sub-No. 2 certificate was originally issued in "grandfather" proceedings for the transportation of "newspapers and newsprint stock consigned to or consigned from newspapers or theatres, and magazines, periodicals, and monthly publications consigned to or from magazine dealers and distributors". It was subsequently modified to "newspapers and newsprint stock consigned to or consigned from theatres or newspaper publishers, and magazines, books, and periodicals consigned to or from magazine dealers and distributors".

Applicant operates 185 pieces of equipment, including 44 tractors and 61 semi-trailers, and maintains terminals at Albany and Atlanta, Ga., Birmingham, Gadsden, and Huntsville, Ala., and Chattanooga and Knoxville, Tenn. Its balance sheet as of December 31, 1965, shows current assets of $296,029 and current liabilities of $210,760. In 1965 it had a net income of $193,822.

Applicant submitted an exhibit listing all of the some 3,500 shipments of books it transported in 1965 from 46 consignors to over 500 consignees, including the shipments from Kingsport Press heretofore discussed. Although applicant maintains that the vast majority of those shipments were lawful, its witness conceded that some of them are clearly unauthorized and that no investigation had been made as to the status of others. Protestants concede that the "large majority" of the shipments shown on this exhibit were within the scope of applicant's certificate, e.g., those from consignors Southern Publishing Association, Abingdon Press, Broadman Press, and Parthenon Press, as well as those to many consignees. No attempt is made here to further analyze the shipments shown on this exhibit as the evidence is insufficient to enable a determination of

whether the individual consignors and consignees are in fact magazine distributors or dealers. Representatives of a few of them testified in support of the application as hereinafter noted. An analysis of those shipments by applicant's representative is as follows: Of the 46 consignors, 33 are magazine dealers or distributors and 7 are not such; of the latter 7, 5 of the consignees are magazine dealers or distributors and 2 are unknown. Of the remaining 6 consignors, which were not investigated, the consignees for 3 of them were magazine dealers or distributors and the status of the other 3 consignees was not determined.

Seven shipper representatives testified in support of the application, viz., Georgia Cumberland Book and Bible House, Methodist Publishing House, Meredith Press, Ginn and Company, Foote and Davies, Birmingham Board of Education, and Baptist Sunday School Board.

Georgia Cumberland Book and Bible House is owned and operated by the Seventh-Day Adventist Church and protestants concede that its activities along with those of the other divisions of that Church (Southern Publishing Association and Home, Health and Education Service) are within applicant's existing authority. Such being the case, applicant's purpose in presenting this witness was to stress the problems involved in interpreting this authority particularly in distinguishing books from magazines and determining whether a given consignor or consignee is a magazine distributor or dealer. Applicant's services have been satisfactorily used for 7 or 8 years, during which time it has never refused to handle a shipment for lack of authority.

Methodist Publishing House and its divisions, Parthenon Press (manufacturing), Abingdon Press (wholesale outlet), Cokesbury Press (retail outlet), and Graded Press (publisher of church school material), print, publish, sell, and distribute magazines and books and protestants concede that they may be served under applicant's present

authority. Applicant's services have been satisfactorily used since 1954. In 1965 the several divisions used applicant for the transportation of 129 shipments of books primarily between Nashville and Atlanta.

Meredith Publishing Company publishes books, magazines, and periodicals. The *Better Homes & Gardens* publications which it ships by applicant are shipped from Des Moines, Iowa, to distributors at Atlanta in pool cars. Applicant's service, which has been used since 1953, has been good. In 1965 it moved approximately 78 shipments of books by applicant from Atlanta to various points on the considered routes. Its practice, which is the normal practice in the magazine and book publishing business, is for the publisher to sell to a wholesaler or distributor who takes title or receipt and thereafter markets the publications through a retailer to the ultimate consumer. Here again, protestants concede that shipments from this company are within applicant's authority inasmuch as they are always to a magazine distributor.

Ginn & Company of Atlanta publishes books and related materials primarily for schools. It ships to consignees in Georgia and to its depositories at Nashville and Birmingham, among other points. In Birmingham it ships to a public warehouse which handles books of various educational publishers for whom it acts as agent in distributing them to Alabama school book depositories. It has used applicant for transporting books both intrastate and interstate since 1958 and has had a constant problem of determining whether applicant can handle certain shipments inasmuch as Ginn handles no magazines.

Foote and Davies, a division of McCall Corporation, is a commercial or contract printer of magazines, books and periodicals which are shipped to news agencies, warehouses, schools, and churches. It specializes in high school and college yearbooks and about 90 percent of its books are

shipped to schools. About 90 percent of the publishers leave the routing of their shipments to Foote and Davies. The consignees are, of course, specified by the publisher. Applicant's service has been used since 1957 and always found to be good, whereas other carriers were tried and found to be not so good.

Birmingham City Board of Education orders magazines for 13 of the 100 schools under its jurisdiction on an annual bid basis. During the school season the magazines are mailed direct to the schools but during the summer when some of the schools are closed they are sent to the offices of the Board which delivers them to the schools when they are opened. Books are ordered from local depositories as well as from out-of-State sources. In the future it is anitcipated that more books will be ordered from sources located at Atlanta. Applicant's service on the movement of books from Atlanta has been completely satisfactory; however, the Board has no control over the delivery and is not concerned with the carrier selected.

The Baptist Sunday School Board of Nashville, Tenn., through its several divisions (Broadman's Press, Convention Press, and Broadman's Sales) publishes, prints, sells, and distributes magazines and books. Its publications are distributed to retail and wholesale outlets and to churches, and protestants concede that shipments to and from the Board are within applicant present authority. The Baptist Book Stores which are operated by the Board have heretofore been discussed in the complaint proceeding. In 1965 the Board tendered applicant 168 shipments of books and the Book Stores received 95 shipments of books by applicant. The Atlanta Book Store always requests the services of applicant as it is the only carrier providing overnight delivery from Nashville to Atlanta. The witness considers the Book Stores to be magazine dealers though not primarily such.

Protestants

Tennessee Carolina Transportation, Inc., holds authority to transport general commodities, with exceptions, (a) over irregular routes, between Charlotte, N. C., on the one hand, and, on the other, points in South Carolina within 150 miles of Charlotte, except points in Anderson, Cherokee, Greenville, Oconee, Pickens, and Spartanburg Counties, S. C. that part of York County, S. C., west of South Carolina Highways 49, 5 and 91, that part of Chester County, S. C., west of South Carolina Highways 91 and 9, that part of Union County, S. C., north of South Carolina Highway 9, and those in North Carolina other than those in Mecklenburg County and those south of U. S. Highway 29 between the South Carolina-North Carolina State line and Charlotte, N. C., and west of North Carolina Highway 49 between Charlotte and the North Carolina-South Carolina State line and those on the indicated portions of the highways specified, and (b) over irregular routes extending from Charlotte, on the east, to Nashville, on the west, via Hickory and Ashville, N. C., and Knoxville, Cookeville, Chattanooga and McMinnville, Tenn. It operates 475 pieces of equipment and has terminals at Ashville, Charlotte, Greensboro, Hickory and Raleigh, N. C., and Chattanooga, Cookeville, Knoxville, McMinnville and Nashville, Tenn. During the first three months of 1966, it transported 52 shipments of books or magazines weighing a total of 197,056 pounds. Four shipments originated at Kingsport and were received from interline carriers at Knoxville, and the balance were received at Nashville. Destinations were all in North Carolina and Virginia. Until about 1960, it participated in such traffic to Alabama and Georgia points but it was lost to competition. A number of its shipments also included such miscellaneous items as scissors, clay moldings, envelopes and notions. The witness believes that all of the book traffic in the foregoing shipments would be subject to diversion if this application is granted. It is considered desirable traffic which is

continually solicited and it has been handled for a number of years. The exhibit listing the above shipments is predicated on the assumption that neither the consignee nor the consignor is a dealer or distributor of magazines.

Dance Freight Lines, Inc., holds authority to transport general commodities over regular routes between Cincinnati, Ohio and Columbus, Ga., through such points as Kingsport, Morristown, Knoxville and Chattanooga, Tenn., and Athens, Atlanta and Macon, Ga. It has interline arrangements at Atlanta and Columbus on traffic to Alabama and arrangements with other carriers, including Mason and Dixon and Tennessee Carolina, at Chattanooga and Knoxville. It maintains terminals at Atlanta, Athens, Columbus and Macon, Ga., and Chattanooga, Kingsport, Knoxville and Morristown, Tenn., and operates 159 tractors, 37 open-top trailers, and 298 vans, as well as 89 pickup trucks. Between February 1, 1964 and March 17, 1965, it transported the following shipments of books from Kingsport Press, Inc., at Kingsport to receivers in Atlanta: a total of 47 shipments weighing 784,953 pounds and producing a revenue of $3,886. During the period March 18, 1965, through March 31, 1966, it transported from and to the same points 7 shipments weighing 116,396 pounds and producing a revenue of $989. The stated purpose of submitting the above data with a cut-off date of March 17 (which was the date applicant began handling traffic for Kingsport Press) was to show the loss of traffic it experienced as a result of applicant's operations; admittedly, however, some of this traffic was lost to Mason and Dixon. Protestant has received no complaints from Kingsport Press regarding its service to Atlanta. It has also served another shipper at Kingsport, Tenn. Its traffic between Kingsport and Atlanta is heavier northbound; hence, it needs additional southbound traffic to effect a better balance. Between those points it holds out an overnight service. It holds out the same service on its scheduled operation between Atlanta and Chattanooga.

Mason and Dixon Lines, Incorporated holds general commodity regular route authority, as pertinent, between Nashville, Knoxville, Memphis, Birmingham, Chattanooga, and Atlanta, among other points. It maintains terminals at Kingsport, Chattanooga, Cookeville, Greenville, Knoxville, Morristown, Nashville, and Rogersville, Tenn., Atlanta, Dalton and Rome, Ga., and Birmingham, Decatur, and Huntsville, Ala. It operates 750 tractors, 1,200 trailers and 250 pickup trucks. It handles an estimated one million pounds a month for Kingsport Press and also handles books for other shippers at Kingsport. Books are considered desirable traffic, carrying a good rate and often loaded on skids for easy pickup and delivery. It has interline arrangements at various terminal points for serving points not authorized.

The examiner is of the opinion that applicant has failed to establish that the proposed service will meet any useful public purpose or be responsive to a public need. A considerable portion of the book traffic has been handled by applicant within the scope of its authority as being "consigned to or from magazine dealers or distributors"; however, a significant amount of traffic has been handled without appropriate authority under an erroneous interpretation of the considered restriction. Applicant's problem has been more with classifying publications as magazines inasmuch as its literal or dictionary interpretation of "distributors" would allow it to serve anyone who dispenses or passes out magazines to others. As heretofore indicated, a proper construction of that term according to commercial or trade usage is that it means one (commonly called a wholesaler) whose regular business function is that of a middleman in the marketing of goods in that he purchases such goods from manufacturers or producers and sells them to dealers who in turn sell to the consumer. It does not appear that a proper interpretation of the certificate as indicated herein places an undue burden on applicant so as to require removal of the restriction considered here. The application should be denied.

FINDINGS

In No. MC-C-4892, the examiner finds that defendant's transportation of books for Kingsport Press, Inc., of Kingsport, Tenn., to the consignees as described in this report was not authorized by its certificate No. MC-65697 (Sub-No. 2) insofar as it authorizes the transportation of books "consigned to or from magazine dealers and distributors"; and that an appropriate order should be entered in No. MC-C-4892 requiring defendant to cease and desist from such transportation.

In No. MC-65697 (Sub-No. 34), the examiner finds that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation.

In view of the findings herein, it is recommended that the appended orders be entered.

By *James A. McKiel*, Hearing Examiner.

(Signature) James A. McKiel

Examiner's Report

APPENDIX A

Authority Sought By the Sub-No. 34 Application

Magazines, books, and periodicals:

(A) Between Atlanta, Ga., and points in Alabama, Tennessee, and Georgia, as follows:

[list of specific routes omitted]

(B) Between Chattanooga, Tenn., and Nashville and Knoxville, Tenn., and Rome, Ga., as follows:

[list of specific routes omitted]

(C) Between Knoxville, Tenn., and Elizabethton and LaFollette, Tenn., as follows:

[list of specific routes omitted]

(D) Between Birmingham, Ala., and Florence, Ala., as follows:

[list of specific routes omitted]

(E) Between Montgomery, Ala., and Prattville, Ala.: [routes omitted] Service is proposed to and from all intermediate points on each of the above described routes.

Examiner's Report

APPENDIX B

Authority Presently Held in No. MC-65697 (Sub-No. 2)

Newspapers and newsprint stock consigned to or consigned from theatres or newspaper publishers, and *magazines, books, and periodicals* consigned to or from magazine dealers and distributors.

(A) Between Atlanta, Ga., and points in Alabama, Tennessee and Georgia, as follows:

[list of specific routes omitted]

(B) Between Chattanooga, Tenn., and Nashville and Knoxville, Tenn., and Rome, Ga., as follows:

[list of specific routes omitted]

(C) Between Knoxville, Tenn., and Elizabethton and LaFollette, Tenn., as follows:

[list of specific routes omitted]

(D) Between Birmingham, Ala., and Florence, Ala., as follows:

[list of specific routes omitted]

(E) Between Montgomery, Ala., and Prattville, Ala.: [routes omitted] Service is authorized to and from all intermediate points on the above-specified routes:

Recommended Order

Recommended by James A. McKiel,
Hearing Examiner.

(Signature) James A. McKiel

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of , A. D. 1966.

No. MC-C-4892

DANCE FREIGHT LINES, INC.

v.

THEATRES SERVICE COMPANY

This proceeding being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the examiner, on the date hereof, having made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That defendant, Theatres Service Company be, and it is hereby, notified and required to cease and desist and thereafter to refrain and abstain from the performance of transportation, in interstate or foreign commerce, of the character found in said report to be unlawful and in violation of the provisions of the Interstate Commerce Act.

It is further ordered, That the statutory compliance date, after which defendant will be held to be in willful violation of this order, shall be the 30th day following service of the notice that this order has become effective as the order of the Commission, division 1.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

H. NEIL GARSON,
Secretary.

(SEAL)

Recommended Order

Recommended by James A. McKiel, Hearing Examiner.

(Signature) James A. McKiel

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of , A. D. 1966.

No. MC-65697 (Sub-No. 34)

THEATRES SERVICE COMPANY EXTENSION—
MAGAZINES, BOOKS, AND PERIODICALS

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That said application be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

H. NEIL GARSON,
Secretary.

(SEAL)

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1267

THEATRES SERVICE COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND DANCE FREIGHT LINES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. 1a, 278 F. Supp. 7) sustaining the Interstate Commerce Commission's interpretation of appellant's motor carrier certificate and its conclusion that certain shipments transported by appellant are beyond the scope of that certificate.

299-344—68

Appellant, a motor common carrier, is authorized by a certificate of public convenience and necessity to transport, *inter alia:* "magazines, books, and periodicals consigned to or from magazine dealers and distributors," in specified geographic areas (J.S. 26a). On August 27, 1965, appellant filed an application for a certificate which would authorize it to transport magazines, books and periodicals without restriction as to the character of consignor or consignee, between points and over routes which it could already serve.[1] Thereafter, Dance Freight Lines, an appellee herein, filed a formal complaint with the Commission, alleging that appellant had transported eleven specific shipments without authority, because neither the consignor nor the consignee were magazine dealers or distributors. The application and the complaint were consolidated for hearing and decision (J.S. 11a, 105 M.C.C. at 422).

After full administrative proceedings, the hearing examiner held that ordinary commercial usage should control the interpretation of the phrase "magazine dealers and distributors" in the certificate and that, under this standard, the phrase was equivalent in meaning to magazine retailers and wholesalers (J.S. 16a–17a, 105 M.C.C. at 425–26). Since the consignor and consignees involved in the eleven shipments did not qualify, the shipments specified in the complaint were found to exceed the scope of appellant's certifi-

[1] At the same time, appellant filed a petition for interpretation of its existing certificate. At the opening of the hearing, the examiner ruled that this aspect of the consolidated case should be heard first. Appellant withdrew its petition to avoid the necessity of carrying its burden of proof (Tr. 6–12).

cate. The Commission, Division 1, unanimously approved the examiner's report and ordered appellant to cease and desist from the unauthorized shipments (J.S. 8a–9a, 105 M.C.C. 421).

The three-judge district court unanimously sustained the Commission's decision and order (J.S. 1a–7a, 278 F. Supp. 7 (N.D. Ga.)).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The interpretation of a certificate issued by the Commission is primarily a question for that agency, *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 177, and unless its interpretation is clearly erroneous it is binding on the courts, *Nelson, Inc.* v. *United States*, 355 U.S. 554, 558. The district court, upon a careful examination of the administrative record, correctly held that the Commission's interpretation and application of the terms of appellant's certificate of public convenience and necessity were amply justified and in full accord with the facts (J.S. 4a–7a, 278 F. Supp. at 9–11).

1. Appellant's principal contention is that the Commission erroneously refused to give "magazine dealers and distributors" its literal dictionary meaning,[2] and instead interpreted the certificate in the

[2] Appellant contended that the literal definition of "distributor" included both a Board of Education which orders magazines and then places copies in its schools' libraries, and a teacher who collects children's nickels, buys the *Weekly Reader* magazine for her class, and then hands out the copies (Tr. 224–225).

light of ordinary commercial usage. However, as the lower court found, the Commission's reliance upon ordinary commercial usage is in accord with established law (*Interstate Commerce Commission* v. *Black,* 6 Federal Carriers Cases, ¶ 80,466, pp. 2365–2368, affirmed, 167 F. 2d 825, 827–828 (C.A. 5), certiorari denied, 335 U.S. 818 (J.S. 6a, 278 F. Supp. 10)), and appellant has failed to demonstrate any reason why commercial usage is inappropriate in this particular case.

2. The determination of whether the eleven specific shipments consigned by Kingsport Press were beyond the scope of appellant's certificate was primarily a question of fact for the determination of the agency. The Commission was clearly within its discretion in concluding that Kingsport's occasional mailings of publications do not bring it within the term "magazine dealer or distributor," and substantial evidence supports the Commission's further finding that none of the eleven consignees was a magazine dealer or distributor.[3] The lower court having sustained the Commission's determination, there is no occasion for plenary review of this essentially factual issue. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491.

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[3] The Georgia School Book Depository and Allyn & Bacon, Inc., consignees on seven of the eleven shipments, were conceded by appellant to be neither magazine dealers nor distributors (Tr. 30–31, J.S. 4a, 278 F. Supp. at 9). One shipment was consigned to Sister Mary Severine at St. Joseph's High School, and the remaining three to two Baptist Book Stores, which the Commission found were not magazine dealers or distributors within the commercial meaning of the term (Tr. 31, J.S. 5a, 7a, 16a, 17a, 278 F. Supp. at 10–11, 105 M.C.C. at 426).

3. Finally, the Commission was clearly acting within its discretion in considering all the relevant evidence presented in the consolidated application and complaint proceedings,[4] and appellant has not demonstrated that the consolidation of the proceedings in any way prejudiced its interests. Appellant was a party to both proceedings and participated fully therein.[5] In both proceedings, the evidence was directed to the interpretation of appellant's certificate and the permissible scope of operations under that certificate. "In these circumstances it is difficult to see how [appellant] could have sustained substantial prejudice from the Commission's consideration of the evidence upon matters as closely related as those in issue in these two proceedings." *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 528.

Appellant's argument (J.S. 24–36) that the Commission improperly shifted the burden of proof is merely an indirect way of challenging the sufficiency of the evidence on which the Commission based its findings, discussed *supra*. The Commission considered all the evidence adduced during the consolidated hearing and found that it established that Kingsport Press, Inc., was not a "distributor" and that none of the eleven consignees qualified as "dealers" or "distributors." The district court correctly held that

[4] Similar consolidation of I.C.C. proceedings was sustained in *Denver Chicago Transport Co., Inc.* v. *United States*, 183 F. Supp. 785, 786 (D. Colo.), affirmed, *per curiam*, 364 U.S. 627. Cf. *American Trucking Assns.* v. *United States*, 326 U.S. 77, 83.

[5] Indeed, appellant filed a single brief with the Commission in its role as "applicant-defendant" (J.S. 11a, 105 M.C.C. at 423).

these findings were "justified" by the evidence (J.S. 4a–7a, 278 F. Supp. at 9–11).

CONCLUSION

This case presents no substantial issue warranting plenary consideration by this Court. The judgment of the court below should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1267

THEATRES SERVICE COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION
and DANCE FREIGHT LINES, INC., Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

MOTION TO AFFIRM

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MOTION TO AFFIRM

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 16(1c) of the Rules of this Court, Dance Freight Lines, Inc., appellee, respectfully moves the Court to affirm the judgment of the District Court.

I.

STATEMENT OF THE CASE

This is an appeal from a final judgment of the United States District Court for the Northern District of Georgia (Jurisdictional Statement, pp. 1(a)–7(a)), sustaining a Decision and Order of the Interstate Commerce Commission (Jurisdictional Statement, pp. 8(a), 9(a)).

On August 27, 1965 appellant filed an application for a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of magazines, books, and periodicals, between points and over routes which it already had authority to serve, the purpose of the application being to modify the existing certificate so as to eliminate the requirement that the magazines, books, and periodicals be consigned to or from magazine dealers or distributors. On September 2, 1965 Dance Freight Lines, Inc., appellee herein, filed a formal complaint with the Commission and thereupon the Interstate Commerce Commission instituted a proceeding in Docket No. MC-C-4892 to determine whether appellant, a motor common carrier operating under certificate of public convenience and necessity issued in Docket No. MC-65697 (Sub-No. 2), was and had been transporting "books" from Kingsport, Tennessee which are not authorized by said certificate. The application proceeding in Docket No. MC-65697 (Sub-No. 34) and the complaint proceeding in Docket No. MC-C-4892 were consolidated for hearing and decision. The Examiner issued his Report and Recommended Order (Jurisdictional Statement pp. 10(a)–28(a)), recommending that a cease and desist order be issued in Docket No. MC-C-4892 and that the application in Docket No. MC-65697 (Sub-No. 34) be denied. The Commission, Division 1, issued its Decision and Order (Jurisdictional Statement, pp. 8(a), 9(a)) upholding the Examiner's Report and Recommended Order.

Appellant filed its complaint in the United States District Court for the Northern District of Georgia seeking to have set aside the Order of the Commission in Docket No. MC-C-4892.

The certificate in question authorizes the transportation of:

> "****magazines, books,* and *periodicals* consigned to or from magazine dealers and distributors,"

The Examiner and the Commission, using the aid of the *Encyclopedic Dictionary of Business*, Prentiss-Hall, Inc., New York, 1952, interpreted the certificate and held that the terms "dealers" and "distributors" should be defined according to their ordinary commercial usage, and that, as used in the certificate, a "dealer" is one who deals in magazines at the retail level, and a "distributor" is one who acts as a middleman in the marketing of goods by purchasing them from manufacturers or producers and selling them generally to various dealers who in turn deal with the ultimate consumer (Jurisdictional Statement, pp. 15(a), 16(a)). They then applied these interpretations to the business activities of the consignor and consignees involved and determined that they were neither dealers nor distributors of magazines (Jurisdictional Statement, pp. 13(a)–17(a)).

The three Judge District Court unanimously sustained the Commission Decision.

II.

ARGUMENT

It is clear that the Commission has the power and discretion to construe and interpret the scope of a certificate which it has issued and such construction and interpretation will not be set aside unless clearly erroneous. *U.S.A.C. Transport v. U.S.*, 235 F. Supp. 689, aff'd. 380 U.S. 450; *Andrew G. Nelson, Inc. v. U.S.*, 355 U.S. 554, 558; *J. B. Acton, Inc. v. U.S.*, 221 F. Sypp. 174, aff'd. *per curiam*, 84 S. Ct. 1133. The District Court

undertook to examine the Commission's ruling with respect to the consignor and the consignees, and concluded that such interpretations were proper and that their application was based on substantial evidence (Jurisdictional Statement, pp. 3(a)–6(a)). Appellee therefore respectfully submits that there is no reason for further review by this Honorable Court.

1—Appellant's first contention is that the interpretation placed on its certificate is arbitrary. However, from the inception of this case appellant has attempted to apply strained and tortured interpretations to the terms of the certificate and in effect has taken the position that any one who "passes out" magazines is a magazine "distributor", and that any one who ever has occasion to "sell" a magazine is a magazine "dealer".[1] In fact, at the hearing in the administrative proceeding appellant's witness clearly admitted that he makes no distinction between the terms "ships" and "distributes".[2] In essence, appellant's contention is that the *literal* definition of the subject terms used in its certificate should be applied.[3] Significantly, appellant consistently has argued that the definition of the terms as contained in *Webster's Third New International Dictionary*, must govern, and not the definitions as contained in the dictionary used by the Examiner and the Commission. Thus, appellant's argument is essentially, that the *wrong dictionary* was used. Appellant further argues that the Commission's interpretation does not conform strictly to the evidence presented in the proceeding. But all of these arguments overlook the fact that the Commission, in interpretating its own certificates, is not confined to the evidence presented, and can proceed on an independent basis, and can apply any reasonable standard as long as there is a rational basis in support. *Simpson v. U.S.*, 200 F. Supp. 372, aff'd. *per curiam*, 369 U.S. 526. It has been held even that the Commission can arrive at its

[1] Tr. 223-225; 235–241; 254–257. ("Tr" refers to the transcript of record in the adminstrative proceeding.)

[2] Tr. 254–257.

[3] It is true that appellant, in its Jurisdictional Statement, uses the word "ordinary" definition, but this word has been used consistently by appellant to mean "literal". See Appellant's Exceptions to Examiner's Report, page 15; Jurisdictional Statement pages 10-11 Footnote 8.

interpretation through the application of its own "cumulative expertise". *J. B. Acton, Inc. v. U.S.*, supra; *USAC Transport v. U.S.*, supra.

2—Appellant's next contention is that it was prejudiced by a consideration of the evidence presented in the application proceeding which was consolidated with the complaint proceeding. In the first place, at the trial before the Administrative Agency the appellant attempted to use its supporting witnesses who testified in the application proceeding, to support its interpretation and to use their testimony as evidence in opposition to the complaint case.[4] Moreover, the Commission is not confined to a record of a particular proceeding, *Simpson v. U.S.*, supra, at page 377, and especially should this be true where the proceedings, as here, involve closely related matters and were consolidated for hearing and decision. *U.S. v. Pierce Auto Freight Lines*, 327 U. S. 515.

3—Appellant next contends that it was prejudiced by the shifting of the burden from Dance, the complainant in the Administrative Proceeding, to appellant. In this connection it is argued that the District Court ignored the "lack of evidence" in support of the Commission's findings with respect to the business activities of the consignor and consignees and that the findings of the Agency are not supported by the evidence. However, since there is evidence in the record relative to such business activities appellant's real complaint must be deemed to be with the weight given the evidence by the Agency, which, it is submitted, the District Court properly refused to evaluate. *Simpson v. U.S.*, supra; *Malone Freight Line v. U.S.*, 107 F. Supp. 949. Nor does the fact that one party has the burden of proof mean that such party has to introduce *all* the proof in the case, which is the essence of appellant's argument. The Commission considered all the evidence of record and concluded that complainant, appellee herein, had carried its

[4] Intervenor's Exhibit No. 1.

burden. Accordingly, the District Court held that such conclusions were supportable by the evidence and, therefore, were not erroneous or arbitrary.

III.

CONCLUSION

In view of the above, appellee respectfully submits that no substantial question is presented by this appeal and that, therefore, the judgment of the District Court below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

THEATRES SERVICE CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 1267. Decided May 27, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.